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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Carmen T. Mullen, Circuit Court Judge

Case No. 2020-CP-07-00091
Appellate Case No. 2020-000883

Barbara Killingsworth and Brian Killingsworth Respondents,

v.

Stokes Brown Toyota of Hilton Head..... Appellant.

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

Barbara Killingsworth and Brian Killingsworth,

Plaintiffs,

v.

Stokes Brown Toyota of Hilton Head,

Defendant.

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO.: 2020-CP-07-00091

**ORDER DENYING MOTION TO COMPEL
ARBITRATION**

This matter came before the Court on Defendant’s Motion to Stay and Compel Arbitration. A hearing was held on May 15, 2020. Appearing for the Defendant were Bradford Martin, Esq. and Laura Teer, Esq. Rachel G. Peavy, Esq. appeared on behalf of the Plaintiffs. The Court heard oral argument from the parties, and reviewed the memoranda of law submitted by counsel. After careful review, the Court hereby finds that because a fall does not arise out of, or relate to, the purchase of a vehicle, and, accordingly is outside the scope of the parties’ arbitration agreement. Accordingly, the Motion is denied and the matter allowed to proceed to trial.

Factual Background

This is a personal injury case which arises out of Barbara Killingsworth’s fall at a car dealership lot owned by the Defendant Stokes Brown Toyota (hereafter “the Dealer”). On the evening of April 11, 2018, Mr. and Mrs. Killingsworth had completed their car purchase in the office and were walking out to their new car. Mrs. Killingsworth fell while walking to her car and allegedly suffered injuries. Plaintiffs brought suit for personal injuries and loss of consortium arising out of Mrs. Killingsworth’s injuries.

Dealer filed a motion to compel arbitration of these claims, alleging that the parties intended to arbitrate such personal injury claims by virtue of executing an arbitration agreement (“the Agreement”) as part of their purchase of a 2008 Toyota Highlander on the evening in question. The Agreement, a copy of which was filed with the Court, provides, in part:

“Any claim or dispute, whether in contract, tort, statute or otherwise (including the interpretation and scope of this Arbitration Agreement, and the arbitrability of the claim or dispute), between you and us . . . which arise out of or relate to the vehicle described above, your credit application, your purchase of this vehicle, your purchase of any additional products or services...the financing of your purchase of the vehicle, [or] repairs to and serving of the vehicle or any matters related thereto (a “Claim”) shall, at your or our election, be resolved by neutral, binding arbitration and not by a court action.”

Applicable Law

Not even the broadest arbitration provision applies when the claim at issue and the parties’ contract lack a “significant relationship.” Aiken v. World Fin. Corp. of S.C., 373 S.C. 144, 151, 644 S.E.2d 705, 709 (2004). No matter how broadly worded an arbitration contract is written, generally applicable contract law holds that its scope cannot be unbounded. Landers v. Fed. Deposit Ins. Corp., 402 S.C. 100, 115, 739 S.E.2d 209, 217 (2013) (“even the broadest of [arbitration] clauses have their limitations”). “[Arbitration] is predicated on an agreement to arbitrate because parties are waiving their fundamental right to access to the courts.” Wilson v. Willis, 426 S.C. 326, 827 S.E.2d 167 (S.C. 2019). “[A] party seeking to compel arbitration under the FAA must establish that (1) there is a valid agreement, and (2) the claims fall within the scope of the agreement . . . While the presumption in favor of arbitration applies to the scope of an arbitration agreement, it does not apply to the existence of such an agreement...” 827 S.E.2d 173. Under Aiken, the Supreme Court articulated a “mutual assent” requirement to conclude that “arbitration is a matter of contract and a party cannot be required to submit to arbitration any

dispute which he has not agreed to submit.” Id. at 149, 644 S.E.2d at 708 (citing Zabinski v. Bright Acres Assocs., 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001)).

While fully crediting state and federal pro-arbitration policy, our Supreme Court in Aiken held that “even the most broadly-worded arbitration agreements still have limits.” Aiken, 373 S.C. at 151, 644 S.E.2d at 709; See also Landers, 402 S.C. at 115, 739 S.E.2d at 217. See also Seifert v. U.S. Home Corp., 750 So.2d 633, 638 (Fla.1999) (“[T]he mere fact that the dispute would not have arisen but for the existence of the contract and consequent relationship between the parties is insufficient by itself to transform a dispute into one ‘arising out of or relating to’ the agreement.”); The Vestry and Church Wardens of the Church of the Holy Cross v. Orkin Exterminating Co., Inc., 356 S.C. 202, 209, 588 S.E.2d 136, 140 (Ct.App.2003) (“[T]he mere fact that an arbitration clause might apply to matters beyond the express scope of the underlying contract does not alone imply that the clause should apply to every dispute between the parties.”) (cited with approval in Aiken v. World Finance Corp. of SC, 644 S.E.2d 705, 373 S.C. 144 (S.C. 2007) The “significant relationship” test the Court in Aiken used to determine the limits of a broadly-worded arbitration contract is an application of the mutual assent rule that applies to every contract regardless of its subject matter.¹

Findings

¹ The “significant relationship” test is not a South Carolina-specific rule. Many other jurisdictions use this analysis to determine the boundaries of a broadly worded arbitration provision. See e.g. Wachovia Bank, N.A. v. Schmidt, 445 F.3d 762, 767 (4th Cir. 2006) (quoting J.J. Ryan & Sons v. Rhone Poulenc Textile, S.A., 863 F.2d 315, 321 (4th Cir. 1988)); Jackson v. Shakespeare Found., Inc., 108 So.3d 587, 593 (Fla. 2013); Griggs v. Evans, 43 A.3d 1081, 1088 (Md. App. 2012).

Our Supreme Court’s “significant relationship” test under Aiken requires a meeting of the minds in order to form a contract – in the instant case, the Court finds there was no agreement to arbitrate a personal injury claim that is so far removed from the subject matter of the contract. To find otherwise would allow any retail business to include the word “tort” in its customer’s sales paperwork, and then avoid a jury trial when that same customer is hit by a falling awning on their way down the steps after completing their purchase. By the Dealer’s reasoning, the scope of this arbitration agreement is virtually unlimited and encompasses these personal injury claims because the Plaintiffs were required to walk out to the parking lot to retrieve the vehicle, and thus Mrs. Killingsworth’s fall is part of the sales transaction. The Court concludes that such an interpretation of the Agreement contravenes established South Carolina law.

In Aiken, employees of a consumer lender were accused of taking borrowers’ personal identifying information (e.g. social security numbers and dates of birth) and misappropriating them to obtain sham loans in the borrowers’ name. 373 S.C. at 146-47, 644 S.E.2d at 707. The borrowers alleged negligent and intentional tort claims against the lender, which defended by citing an arbitration provision in the lender’s legitimate loan contract with each borrower. Id. The Court was tasked with determining whether the admittedly broad arbitration provision from the borrower-lender contract extended to cover the borrower’s claims based on the brazen, but unrelated, misconduct of the lender’s employees. Id. at 147, 644 S.E.2d at 708.

The Court rejected the argument that, because Aiken’s contracts with World Finance gave the conspirators access to his personal information (which allowed them to commit the crimes), there was a “significant relationship” between his claims and the underlying loan agreement, thereby requiring arbitration. The Court noted that the defendant was essentially applying what amounted to a “but for” causation standard which could essentially include every dispute

imaginable between the parties. Id.² Similarly, here the Court finds that there is no significant relationship between the fall in the parking lot and the purchase and financing of the Toyota vehicle – put simply, there is no way that the Plaintiffs could have anticipated having to submit their personal injury claims to arbitration when they were in the finance office that evening.³

“The purpose of the rules of contract construction is to ascertain the intention of the parties as gathered from the contents of the entire document and not from any particular provision within the contract. Where one interpretation of a contract makes it unusual or extraordinary and another interpretation, equally consistent with the language employed, would make it reasonable, fair, and just, the latter construction prevails. An interpretation which establishes the more reasonable and probable agreement of the parties should be adopted while an interpretation leading to an absurd result should be avoided.” Koon v. Fares, 666 S.E.2d 230, 379 S.C. 149 (S.C. 2008).

The required connection between core contract rules and the scope of arbitration is further supported by three (3) post-Aiken cases applying the exception. All three held the exception was nothing more than an application of the rule requiring courts to interpret a contract consistently with its parties’ intent. In Chassereau v. Global Sun Pools, Inc., 373 S.C. 168, 644 S.E.2d 718 (2007), a woman who financed a swimming pool was not compelled to arbitrate her claim that the pool seller’s agents defamed and harassed her when she fell behind on her payments. Chassereau

² Under the Dealer’s interpretation of the arbitration agreement, it could appear that any customer who was ever injured at the dealership (whether hit by a car driven by a drunk employee while waiting for an oil change, or shot by a just-fired dealership employee while dropping their car off to be detailed, or assaulted in a restroom before receiving delivery of their vehicle) would be required to arbitrate their claims for personal injuries.

³ The plain language of the Agreement specifically limits the scope of the agreement to those which relate to the vehicle described on the face of the document, to wit: “[a]ny claim or dispute . . . which arise out of or relate to the vehicle described above. . .”. Plaintiffs’ claims arising out of this fall would exist if they were merely browsing, as they are not tied to either the specific vehicle or their buyer status; rather, they arise out of their invitee status on the premises.

examined the broadly worded arbitration provision carefully but, given the lack of connection between the sales contract and the defamation claim, the court was left with “no doubt that [the woman] *did not intend to arbitrate*” the claim. 373 S.C. at 172, 644 S.E.2d at 721 (emphasis added); See also Partain v. Upstate Automotive Group, 386 S.C. 488, 689 S.E.2d 602 (2010) (holding that a car buyer “did not intend to submit” to arbitration his claim that a dealer maliciously switched the agreed-upon car with an inferior model).

Similarly, an arbitration provision in a financial services contract between investor and advisor did not cover negligence or consumer fraud claims because the prospect of an advisor converting his client’s funds for personal use was “not within the parties’ contemplation” when the contract was formed. Hatcher v. Edward D. Jones & Co., L.P., 379 S.C. 549, 554, 666 S.E.2d 294, 297 (Ct. App. 2008) (finding misconduct underlying negligence claim was “completely outside the expectations of the parties at the time the contract was entered”). Hatcher went one step further, holding that to interpret a broadly worded arbitration provision to apply to claims wholly unforeseeable at contract formation would be inconsistent with pro-arbitration policy by contravening the parties’ intentions. Id.

The Dealer urges this Court to find that “any interpretation covering the dispute is all that is required”, relying upon the case of Landers v. Fed. Deposit Ins. Corp., 402 S.C. 100, 739 S.E.2d 209 (2013). However, in Landers, the tort claims asserted bore a significant relationship to the arbitration agreement; *to wit*, the plaintiff was a high-ranking bank founder and executive who alleged he was unable to perform his job duties as a result of the conduct of the bank’s CEO. The plaintiff brought claims for breach of contract, constructive termination, slander, and intentional infliction of emotional distress, among others, related to his “on-the-job” conditions. The executive had previously signed an employment contract with the bank which provided that “any

controversy or claim arising out of relating to this contract, or the breach thereof, shall be settled by binding arbitration....” 739 S.E.2d 211. Compelling arbitration, our Supreme Court found that the tort claims were significantly related to the employment agreement, noting that “the perceived inability to perform one’s job certainly relates to an employment contract.”

Unlike the plaintiff in Landers, here there is no significant relationship between the vehicle and the fall. The fall does not arise out of, or relate to, the purchase of the vehicle and the Plaintiffs’ claims are outside the scope of this Agreement.

Accordingly, the Motion is hereby DENIED.

AND IT IS SO ORDERED.

Carmen T. Mullen
Presiding Judge, 14th Judicial Circuit

Beaufort, South Carolina
Dated: _____



Beaufort Common Pleas

Case Caption: Barbara Killingsworth , plaintiff, et al VS Stokes Brown Toyota Of
Hilton Head
Case Number: 2020CP0700091
Type: Order/Compel

So Ordered

s/Carmen T Mullen 2142

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Barbara Killingsworth et al
PLAINTIFF(S)

Stokes Brown Toyota Of Hilton Head
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (*CHECK REASON*):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled);
 Other
- ACTION STRICKEN (*CHECK REASON*):** Rule 40(j), SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
 Other
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (*CHECK APPLICABLE BOX*):**
 Affirmed; Reversed; Remanded;
 Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

Defendant's Motion to Alter or Amend my May 22, 2020 Order is hereby denied without a hearing.

ORDER INFORMATION

This order ends does not end the case.

See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 06/04/2020 .

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.



Beaufort Common Pleas

Case Caption: Barbara Killingsworth , plaintiff, et al VS Stokes Brown Toyota Of
Hilton Head
Case Number: 2020CP0700091
Type: Order/Electronic Form 4

So Ordered

s/Carmen T Mullen 2142

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STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO.: 2020-CP-_____

Barbara Killingsworth and Brian
Killingsworth,

Plaintiffs,

vs.

Stokes Brown Toyota of Hilton Head,

Defendant.

SUMMONS
(JURY TRIAL REQUESTED)

TO: THE DEFENDANT ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the complaint herein, a copy of which is herewith served upon you, and to serve a copy of your answer to said complaint upon the subscriber, at her office at PO Box 5048, Spartanburg, SC 29304, within thirty (30) days after the service thereof, exclusive of the day of such service, and if you fail to answer the complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the complaint.

HawkLaw, PA

s/Rachel G. Peavy

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Columbia, South Carolina
January 16, 2020

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO.: 2020-CP-_____

Barbara Killingsworth and Brian Killingsworth,

Plaintiffs,

vs.

Stokes Brown Toyota of Hilton Head,

Defendant.

COMPLAINT
(JURY TRIAL REQUESTED)

The Plaintiffs, complaining of the Defendants, would respectfully show unto the Court that:

1. Plaintiffs are citizens and residents of Chatham County, Georgia and are husband and wife.
2. Upon information and belief, Defendant Stokes Brown Toyota (hereinafter "Stokes") is a South Carolina company engaged in the sale of motor vehicles to members of the public and operates a dealership location at 100 Fording Island Road, Bluffton, South Carolina 29910.
3. All acts and omission complained of herein occurred in Beaufort County, South Carolina.
4. This Court has jurisdiction over the person and subject matter of the action and venue is proper in Beaufort County, South Carolina.

FOR A FIRST CAUSE OF ACTION
(Negligence/Gross Negligence)

5. The allegations above are repeated verbatim herein.

6. On or about the evening of April 11, 2018, Plaintiff was shopping for a vehicle at the Stokes dealership location on Fording Island Road in Bluffton, South Carolina, where she was assisted by salesperson Christopher Browne and had the express permission of Defendant to be at the dealership, a retail operation.

7. Plaintiff was one of the last customers in the dealership and the lights were turned off during the time while her transaction was being finalized.

8. Plaintiff was following Browne to retrieve the vehicle she had purchased and, due to lights having been turned off, tripped and fell on a curb that was hidden and/or undetectable due to the lack of required lighting for a property such as this.

9. Upon information and belief, Defendant had actual and/or constructive notice of the unreasonably unsafe conditions on the premises and had the responsibility to ensure the safety of the premises and that of all remaining Stokes customers.

10. Defendant knew, or should have known, of the risks associated with having the lights turned off while customers will still on the premises and completing sales transactions.

11. Defendant negligently breached that duty in one or more of the following ways:

- a) By failing to inspect the store walkways for trip hazards;
- b) By failing to maintain its premises in a reasonably safe condition;
- c) By failing to keep the lights turned on for customers;
- d) By failing to take action to correct known hazards;
- e) By failing to enact adequate protocols ensuring its premises were kept in a reasonably safe condition;

- f) By failing to enforce protocols ensuring its premises were kept in a reasonably safe condition;
- g) By failing to warn Plaintiff of the hazardous condition; and,
- h) In other such ways as will become evident through discovery.

FOR A SECOND CAUSE OF ACTION
(Loss of Consortium as to Plaintiff Brian Killingsworth)

- 12. All prior paragraphs are reiterated as if fully restated verbatim herein.
- 13. As a direct and proximate result of the acts and omission of Defendant complained of herein, Plaintiff Barbara Killingsworth has sustained physical injuries and damages.
- 14. As the direct and proximate result of the injuries and damages sustained by Plaintiff Barbara Killingsworth, Plaintiff Brian Killingsworth, has lost the services, society, and companionship of Plaintiff Barbara Killingsworth, and, therefore, Defendants are a liable to Plaintiff Brian Killingsworth for loss of consortium.

DAMAGES

15. As a direct and proximate result of the acts and omissions complained of above, plaintiff has sustained injuries and damages, including, but not necessarily limited to the following:

- a) Physical injuries and loss of bodily health;
- b) Substantial cost for medical treatment for his injuries past and future.
- c) Substantial pain and suffering past and future.
- d) Loss of enjoyment of life;

- e) Emotional upset and distress; and
- f) Substantial loss of earnings and income past and future.

16. Defendant's careless, negligent, willful, wanton, reckless and unlawful acts were the direct and proximate cause of the accident and resulting injuries and damages to the Plaintiff.

WHEREFORE, Plaintiffs pray for judgment against Defendant for actual and punitive damages in an appropriate amount to be determined at trial; for the costs of this action; and for such other and further relief as the Court may deem just and proper.

s/Rachel G. Peavy
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Christy Kellerhals S.C Bar No.:10266
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P.O. Box 5048
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Telephone: (864) 574-8801
Fax: (864) 574-8810
Attorneys for Plaintiff

Columbia, South Carolina
January 16, 2020

Notice of Buyer: When you sign this Arbitration Agreement, you are agreeing that if a Claim arises that it is covered by this Agreement. You are giving up rights you might have to litigate such Claims in a court or before a jury or to participate in a class action with respect to such a Claim. Other rights that you would have if you went to court may not be available or be more limited in arbitration. It is important that you read this entire Arbitration Agreement carefully before you sign it.

(Exhibit A)

4. Plaintiffs' Complaint alleges two causes of action arising from or related to their purchase of the car (Negligence and Loss of Consortium).

5. Plaintiffs allege Barbara Killingsworth was injured while walking to "retrieve the vehicle she had purchased." (Complaint ¶8). Therefore, all of Plaintiffs' causes of action arise out of, or are related to, Plaintiffs' purchase of the car.

6. The car involved is a 2008 Toyota Highlander manufactured in a state other than South Carolina and sold in South Carolina. Therefore, this transaction involves interstate commerce. Furthermore, Plaintiffs are citizens and residents of Georgia.

7. A clause which provides for arbitration of all disputes "arising out of or relating to" the contract is construed broadly and is "capable of an expansive reach." *Landers v. FDIC*, 402 S.C. 100, 109, 739 S.E.2d at 213–14 (2013) (citations omitted). A heavy presumption of arbitrability requires that when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration. *Id.*

8. Plaintiffs, by signing, agreed that "Any arbitration under this Arbitration Agreement shall be governed by the Federal Arbitration Act (9. U.S.C. § 1, et seq.) and not by any state law concerning arbitration." Additionally, the sale of automobiles is considered commerce sufficient for the FAA to apply. *See Saturn Distribution Corp. v. Williams*, 905 F.2d 719 (4th Cir. 1990).

9. The Federal Arbitration Act preempts state law rules and holdings that invalidate the parties' agreement to arbitrate. *See AT&T Mobility v. Concepcion*, 563 U.S. 333, 131 S.Ct. 1740 (2011).

10. Therefore, pursuant to 9 U.S.C. §1 *et seq.* and the Arbitration Agreement, Stokes Motors, Inc. d/b/a Stokes Toyota of Hilton Head seeks an order compelling Plaintiffs to arbitrate each and every claim they may have against Stokes Motors, Inc. d/b/a Stokes Toyota of Hilton Head and staying this action until completion of arbitration.

This Motion is based on the pleadings filed with the Court, the Federal Arbitration Act, the South Carolina Rules of Civil Procedure, and such other and further case and statutory law and supporting affidavits and memoranda as may be appropriate.

Respectfully submitted,

February 20, 2020

s/Bradford N. Martin
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**ATTORNEYS FOR DEFENDANT
STOKES MOTORS, INC. D/B/A STOKES
TOYOTA OF HILTON HEAD**

ARBITRATION AGREEMENT

DATE: 04/11/2018 VEHICLE DESCRIPTION: 2008 TOYOTA TRUCK HIGHLANDER
VEHICLE IDENTIFICATION NUMBER: [REDACTED] 07382

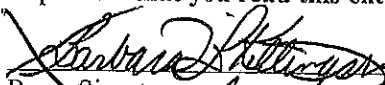

In this Arbitration Agreement, "you" refers to the buyer(s) signing below. "We", "us", and "our" refer to the Dealer signing below and anyone to whom the Dealer assigns this Arbitration Agreement.

Any claim or dispute, whether in contract, tort, statute or otherwise (including the interpretation and scope of this Arbitration Agreement, and the arbitrability of the claim or dispute), between you and us or our employees, agents, successors or assigns, which arise out of or relate to the vehicle described above, your credit application, your purchase of this vehicle, your purchase of any additional products or services (e.g. service agreements, extended warranties, credit insurance, GAP insurance or waivers and the like), the financing of your purchase of the vehicle, repairs to and servicing of the vehicle or any matters related thereto (a "Claim") shall, at your or our election, be resolved by neutral, binding arbitration and not by a court action. Any Claim is to be arbitrated by a single arbitrator on an individual basis and not as a class action. You expressly waive any right you may have to arbitrate a class action. You may choose one of the following arbitration organizations and its applicable rules: the National Arbitration Forum, Box 50191, Minneapolis, MN 55405-0191 (www.arb-forum.com), the American Arbitration Association, 335 Madison Ave., Floor 10, New York, NY 10017-4605 (www.adr.org), or any other organization that you may choose subject to our approval. You may get a copy of the rules of these organizations by contacting the arbitration organization or visiting its website.

Arbitrators shall be attorneys or retired judges and shall be selected pursuant to the applicable rules. The arbitrator shall apply governing substantive law in making an award. The arbitration hearing shall be conducted in the federal district where this Arbitration Agreement was executed. On any claim you file, you will pay the first \$50 of the filing fee. At your request we will pay the remainder of the filing fee and any administrative or hearing fees charged by the arbitration administrator on any claim submitted by you in arbitration up to a maximum of \$1000, which may be reimbursed by decision of the arbitrator at the arbitrator's discretion. Each party shall be responsible for its own attorney, expert and other fees, unless awarded by the arbitrator under applicable law. However, notwithstanding the foregoing, it is understood that we will pay any costs and fees of arbitration that the arbitrator decides we must pay to assure that this arbitration provision is enforceable. If the chosen arbitration organization's rules conflict with this Arbitration Agreement, then the provisions of this Arbitration Agreement shall control. Any arbitration under this Arbitration Agreement shall be governed by the Federal Arbitration Act (9 U.S.C. § 1 et.seq.) and not by any state law concerning arbitration.

Any court having jurisdiction may enter judgment on the arbitrator's award. This Arbitration Agreement shall survive any termination, payoff or transfer of your financing contract. If any part of this Arbitration Agreement, other than waivers of class action rights, is deemed or found to be unenforceable for any reason, the remainder shall remain enforceable.

Notice to Buyer: When you sign this Arbitration Agreement, you are agreeing that if a Claim arises that it is covered by this Agreement. You are giving up rights you might have to litigate such Claims in a court or before a jury or to participate in a class action with respect to such a Claim. Other rights that you would have if you went to court may not be available or be more limited in arbitration. It is important that you read this entire Arbitration Agreement carefully before you sign it.


Buyer Signature 04/11/2018
Date

Co-Buyer Signature 04/11/2018
Date

STOKES BROWN TOYOTA OF HILTON HEAD

By: 
Title: _____

<p>STATE OF SOUTH CAROLINA</p> <p>COUNTY OF BEAUFORT</p> <p>Barbara Killingsworth and Brian Killingsworth,</p> <p style="text-align: right;">Plaintiffs,</p> <p>v.</p> <p>Stokes Brown Toyota of Hilton Head,</p> <p style="text-align: right;">Defendant,</p> <hr style="width: 30%; margin-left: 0;"/>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>IN THE COURT OF COMMON PLEAS</p> <p>C.A. No. 2020-CP-07-00091</p> <p style="text-align: center;">DEFENDANT’S MEMORANDUM IN SUPPORT OF MOTION TO STAY AND COMPEL ARBITRATION</p>
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INTRODUCTION

The car buying process, which may begin with a call or internet search before a customer even comes to the dealership, is not concluded until the customer drives home with the car. The process includes having sufficient inventory displayed attractively on a well landscaped and lit lot, both to assist the customer in car selection and ultimate delivery of the car.

Plaintiffs’ purchase process spanned the course of two days. They came to the Dealership on April 10, 2018 and returned on April 11th. They selected a car and signed the paperwork. Barbara Killingsworth was performing the next step of her purchase while walking to her car to take it home when she tripped on a grassy median and fell next to her car.

Unlike most retailers, a dealership’s lot is an extension of its showroom. The brightness of its lights and the attractiveness of its grassy medians are both important in the selection and delivery of the car. The lighting and grassy medians are also regulated by local ordinances.

Both Plaintiffs signed a stand-alone document during the paperwork phase of the purchase. It was labeled in large bold capital letters: “**ARBITRATION AGREEMENT.**” The Agreement provided:

ARBITRATION AGREEMENT

Any claim or dispute, whether in contract, **tort**, statute or otherwise . . . which arise out of **or relate to** . . . your purchase of this vehicle . . . **or any matters related thereto** (a “Claim”) shall, at your or our election, be resolved by neutral, binding arbitration and not by a court action.

(Ex. A) (emphasis added).

Both of Plaintiffs’ causes of action (Negligence and Loss of Consortium) relate to the injuries she claims while she was completing the purchase process. (Complaint, ¶ 8). These causes of action, therefore, arise out of or relate to the purchase of the car.

ARGUMENT

I. A VALID ARBITRATION AGREEMENT EXISTS

A. Arbitration Agreements are Strongly Presumed to be Valid

In 1925, Congress passed and President Coolidge signed the Federal Arbitration Act, which provides:

A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable save upon such grounds for the revocation of any contract.

9 U.S.C. § 2.

Arbitration, as a matter of contract, must be enforced by the Court according to its terms. *See Henry Schein, Inc. v. Archer & White Sales, Inc.*, ___ U.S. ___, 139 S.Ct. 524 (2019); 9 U.S.C. §2. There is a strong presumption in favor of the validity of arbitration agreements, because both federal and state laws favor them.¹ This is especially true when the agreement is broadly crafted. *Century Indemnity Co. v. Certain Underwriters at Lloyd’s, London*, 584 F3d 513, 521 (3rd Cir. 2009). An order to arbitrate the particular grievance “should not be denied unless it may be said

¹ *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *Carolina Care Plan, Inc. v. United Healthcare Servs., Inc.*, 361 S.C. 544, 606 S.E.2d 752 (2004).

with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *Id.* Anyone challenging the enforceability of an arbitration agreement must rebut the presumption and bear the burden of proving the provision is unenforceable.²

The purpose of the Federal Arbitration Act “was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and has been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts.” *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991).³ “[Q]uestions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.” *Gilmer*, 500 U.S. at 26. To the extent any state law prohibits the agreement between the parties: it is preempted by the FAA. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

B. The Federal Arbitration Act Controls

Plaintiffs signed a separate⁴ document boldly entitled “**ARBITRATION AGREEMENT.**” The Arbitration Agreement provides that it involves interstate commerce and the FAA preempts state law. (Ex.A). The car involved was manufactured in a state other than South Carolina and sold in South Carolina. Therefore, this transaction involves interstate commerce. Additionally, the sale of automobiles is considered commerce sufficient for the FAA to apply.⁵ Federal law preempts state law and requires staying the action to pursue arbitration.⁶

² *Green Tree Fin. Corp. – Ala. v. Randolph*, 531 U.S. 79, 91 (2000).

³ See also *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996); *Soil Remediation v. Nu-Way Envtl.*, 323 S.C. 454, 476 S.E.2d 149 (1996).

⁴ Then Chief Justice Toal explained the benefits of using a separate contract for an arbitration agreement as providing a “greater freedom of choice for the consumer” and “protecting the business from a contention that the arbitration contract is unconscionable.” *Coleman v. Mariner Healthcare, Inc.*, 407 S.C. 346, 357, 755 S.E. 2d 450, 456 (dissent) (2014).

⁵ See *Saturn Distribution Corp. v. Williams*, 905 F.2d 719 (4th Cir. 1990).

⁶ See *AT&T Mobility*, *supra*. (The FAA preempts state law rules and holdings that invalidate the parties’ agreement to arbitrate).

C. The Arbitration Agreement is a Binding Contract

The Arbitration Agreement meets all the requirements for a binding contract. The parties exchanged mutual promises to arbitrate any disputes, which constitutes sufficient consideration.⁷ Plaintiffs signed the Arbitration Agreement, consenting to its terms. A person who can read is bound to read an agreement before signing it.⁸ *See also Sims v. Tyler*, 276 S.C. 640, 643, 281 S.E.2d 229, 230 (1981) ("One who is capable of reading and understanding but fails to read a contract before signing is bound by the terms thereof.").

Because a valid Arbitration Agreement exists, the Plaintiffs promised to arbitrate and the provision is broadly crafted, the Court must stay the case and compel arbitration. Nothing in the Agreement suggests with "positive assurance that the Arbitration is not susceptible of an interpretation" that personal injury claims arise under or relate to the purchase contract. *See Century Indemnity, supra*, 584 F 3d at 524.

II. THE PLAINTIFFS' CAUSES OF ACTION ARE SUBJECT TO THE ARBITRATION AGREEMENT

A. Any Interpretation Covering the Dispute is all that is Required.

Both federal and South Carolina state law are clear that if there is any interpretation of an arbitration agreement that covers a dispute, then arbitration must be ordered. "The heavy presumption of arbitrability requires that when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration." *Landers v. Fed. Deposit Ins. Corp.*, 402 S.C. 100, 103, 739 S.E.2d 209, 213 (2013). Unless a court can say with positive assurance that the agreement is not susceptible to an interpretation that covers the dispute,

⁷ *See Rickborn v. Liberty Life Insurance Co.*, 321 S.C. 291, 300, 468 S.E.2d 292, 304 (1996) (valuable consideration for a contract may consist of some forbearance given).

⁸ *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 542 S.E.2d 360 (2001).

arbitration is required. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 597, 553 S.E.2d 110, 118 (2001).

Courts view arbitration as “a matter of contract, and the range of issues that can be arbitrated is restricted by the terms of the agreement.” *Palmetto Homes, Inc. v. Bradley*, 357 S.C. 485, 492, 593 S.E.2d 480, 484 (Ct. App. 2004). The Arbitration Agreement states that it applies to:

Any claim or dispute, whether in contract, **tort**, statute or otherwise . . . which arise out of **or relate to** . . . your purchase of this vehicle . . . **or any matters related thereto** (a “Claim”) shall, at your or our election, be resolved by neutral, binding arbitration and not by a court action.

(Ex. A)

To decide whether an arbitration agreement encompasses a dispute, this court must determine whether the factual allegations underlying the claim are within the scope of the broad arbitration clause, regardless of the label assigned to the claim. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Hinson v. Jusco Co.*, 868 F. Supp. 145 (D.S.C. 1994). Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. *Towles v. United HealthCare Corp.*, 338 S.C. 29, 524 S.E.2d 839 (Ct. App. 1999); *S.C. Pub. Serv. Auth. v. Great W. Coal*, 312 S.C. 559, 564, 437 S.E.2d 22, 25 (1993).

B. Broadly Worded Agreements Must be Enforced

The Arbitration Agreement provides that it applies to disputes which “arise out of or relate to” the purchase of the vehicle. Arbitration clauses using the words “arising out of or relating to” are construed broadly. *See Landers v. Fed. Deposit Ins. Corp.*, 402 S.C. 100, 109, 739 S.E.2d 209, 213 (2013); *Century Indemnity, supra*, 584 F.3d at 524 (quoting *AT&T Techs. Inc. v. Communication Workers of America*, 475 U.S. 643, 650 (1986)). Courts have held that such broad clauses are “capable of an expansive reach.” *American Recovery Corp. v. Computerized Thermal*

Imaging, Inc., 96 F.3d 88, 93 (4th Cir. 1996). “Under the expansive reach of the FAA a tort claim need not raise an issue that requires reference to or the construction of some portion of the contract in order to be encompassed by a broadly-worded arbitration clause.” *Landers*, 402 S.C at 111, 739 S.E.2d at 214.

A broadly-worded arbitration clause applies to a dispute when a "significant relationship" exists between the asserted claims and the contract. *See Zabinski*, 346 S.C. at 598, 553 S.E.2d at 119. Although South Carolina courts use the term “significant relationship” they only require the allegations “touch matters” covered by the contract. *Landers*, 402 S.C. at 116-117, 739 S.E.2d at 217-218. The South Carolina Supreme Court quoted the Fourth Circuit stating:

We recognize that requiring a *significant* relationship in order to compel arbitration ... appears to be at odds with the language of the [] arbitration clause, which only requires that the [] claims “*relate to*” the [agreement]. We recognize as well that to require such a significant relationship may appear to be in tension with the Supreme Court's mandate that we apply the ordinary tools of contract interpretation in construing an arbitration agreement, and resolve any ambiguities in favor of arbitration.

Id. quoting Wachovia Bank Nat'l Assoc. v. Schmidt, 445 F.3d 762, 767 n. 5 (4th Cir.2006) (emphasis in original).

The South Carolina Supreme Court ruled that the terms were never intended to be separate and independent tests for analyzing the scope of a broad arbitration clause. The Court concluded:

Nonetheless, we note that if ever there did appear to be an appreciable conflict between the two phraseologies in the future, given the text of the FAA, the United States Supreme Court's interpretation of such, and the strong policy favoring arbitration, we would necessarily find that the “touch matters” term hues more closely to Congressional intent concerning the FAA.

C. This Broadly Worded Agreement Covers the Plaintiffs' Claims

Plaintiffs claim that Mrs. Killingsworth fell as she was walking to drive her just purchased car home. (Complaint, ¶ 8). Taking delivery is part of the purchase of the car. Whether a bargain has been “struck” and passage of title had is a matter of the intention of the parties. *S.C. Tax Comm. v. Schafer Distributing Co.*, 247 S.C. 491, 496, 148 S.E.2d 156 (1966). Delivery of possession is strong, if not conclusive evidence of such an intention. *See Southern Fire & Casualty Co. v. Teal*, 287 F. Supp. 617, 620-21 (D.S.C. 1968).⁹ It was foreseeable to a reasonable person in the context of normal business dealings that they would take physical possession of the car on the lot. The alleged fall occurred in the area of the lot Stokes uses to deliver cars. Mr. Killingsworth loss of consortium claim arises from the allegations regarding Mrs. Killingsworth’s injuries. Therefore, Plaintiffs’ dispute is related to their purchase of the car.

The United States District Court for the Eastern District of Pennsylvania found that Plaintiff’s injuries sustained when she was struck by carpet installers negligently moving a piece of furniture was within the scope of her Arbitration Clause with Empire Today for the purchase and installation of carpet. *See Ellin v. Empire Today, LLC*, C.A. 11-2312 (E.D. Pa. 2011). The District Court found the dispute was related to Plaintiff’s Purchase Contract because Empire Today had an obligation under the contract to install carpet, which included moving furniture. The federal judged relied upon authority from the United States Supreme Court and the Third Circuit Court of Appeals: *AT&T Techs. Inc. v. Communication Workers of America*, 475 U.S. 643 (1986); *Century Indemnity Co. v. Certain Underwriters at Lloyd’s, London*, 584 F3d 513 (3rd Cir. 2009). In the

⁹ “The actual delivery of the goods is of the greatest importance as evincing an intention to pass title. If unaccompanied by an explanation or the specification of any condition, the buyer generally has a right to regard it as passing title. A fortiori, if there is an accompanying declaration showing an intention to pass the property to the buyer immediately and not at some future time, the fact of delivery, as evidence of intention, becomes manifestly the most cogent of all legal proofs, where the good faith of the transaction is not impugned for fraud.” 46 Am.Jur., sec. 433, p. 602.

present case, Stokes had an obligation to convey physical possession of the Highlander to the Plaintiffs, which included Plaintiffs walking to the car so it could be driven home.

South Carolina Courts have found tort claims to be encompassed in arbitration agreements contained in employment contracts¹⁰. The South Carolina Court of Appeals likewise found tort claims fell within the scope of an arbitration clause in a stucco purchase agreement which applied to “every controversy or claim arising out of or relating to this Agreement, or the breach thereof....” *Carlson v. S.C. State Plastering, LLC*, 404 S.C. 250, 743 S.E.2d 868 (Ct. App. 2013).

CONCLUSION

Plaintiffs’ causes of action are subject to the Arbitration Agreement. Federal law preempts state law and staying the action to pursue arbitration is the proper remedy. In light of the strong presumption of arbitrability under the FAA, Plaintiffs’ personal injury claims fall within the scope of the broadly written Arbitration Agreement. For the foregoing reasons, this Court should require the Plaintiffs to compel arbitration and stay the case.

Respectfully submitted,

May 13, 2020

s/Bradford N. Martin
Bradford N. Martin, Esq. (SC Bar No. 3658)
Laura W. H. Teer, Esq. (SC Bar No. 16698)
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bmartin@bnmlaw.com

**ATTORNEYS FOR DEFENDANT
STOKES MOTORS, INC. d/b/a STOKES
TOYOTA OF HILTON HEAD**

¹⁰ See *Landers*, 402 S.C. at 111, 739 S.E.2d at 214-15 (finding Landers' defamation claim arbitrable because the alleged defamatory statements "directly related to Landers' ability to perform his duties with Bank"); *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 297, 733 S.E.2d 597, 605 (Ct. App. 2012) (finding Pearson's tort claims, including defamation, arbitrable because the arbitration clause was broad and Pearson's tort claims resulted from his employment).

ARBITRATION AGREEMENT

DATE: 04/11/2018 VEHICLE DESCRIPTION: 2008 TOYOTA TRUCK HIGHLANDER
 VEHICLE IDENTIFICATION NUMBER: [REDACTED] 07382

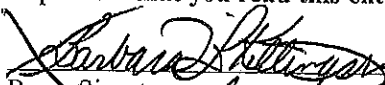

In this Arbitration Agreement, "you" refers to the buyer(s) signing below. "We", "us", and "our" refer to the Dealer signing below and anyone to whom the Dealer assigns this Arbitration Agreement.

Any claim or dispute, whether in contract, tort, statute or otherwise (including the interpretation and scope of this Arbitration Agreement, and the arbitrability of the claim or dispute), between you and us or our employees, agents, successors or assigns, which arise out of or relate to the vehicle described above, your credit application, your purchase of this vehicle, your purchase of any additional products or services (e.g. service agreements, extended warranties, credit insurance, GAP insurance or waivers and the like), the financing of your purchase of the vehicle, repairs to and servicing of the vehicle or any matters related thereto (a "Claim") shall, at your or our election, be resolved by neutral, binding arbitration and not by a court action. Any Claim is to be arbitrated by a single arbitrator on an individual basis and not as a class action. You expressly waive any right you may have to arbitrate a class action. You may choose one of the following arbitration organizations and its applicable rules: the National Arbitration Forum, Box 50191, Minneapolis, MN 55405-0191 (www.arb-forum.com), the American Arbitration Association, 335 Madison Ave., Floor 10, New York, NY 10017-4605 (www.adr.org), or any other organization that you may choose subject to our approval. You may get a copy of the rules of these organizations by contacting the arbitration organization or visiting its website.

Arbitrators shall be attorneys or retired judges and shall be selected pursuant to the applicable rules. The arbitrator shall apply governing substantive law in making an award. The arbitration hearing shall be conducted in the federal district where this Arbitration Agreement was executed. On any claim you file, you will pay the first \$50 of the filing fee. At your request we will pay the remainder of the filing fee and any administrative or hearing fees charged by the arbitration administrator on any claim submitted by you in arbitration up to a maximum of \$1000, which may be reimbursed by decision of the arbitrator at the arbitrator's discretion. Each party shall be responsible for its own attorney, expert and other fees, unless awarded by the arbitrator under applicable law. However, notwithstanding the foregoing, it is understood that we will pay any costs and fees of arbitration that the arbitrator decides we must pay to assure that this arbitration provision is enforceable. If the chosen arbitration organization's rules conflict with this Arbitration Agreement, then the provisions of this Arbitration Agreement shall control. Any arbitration under this Arbitration Agreement shall be governed by the Federal Arbitration Act (9 U.S.C. § 1 et.seq.) and not by any state law concerning arbitration.

Any court having jurisdiction may enter judgment on the arbitrator's award. This Arbitration Agreement shall survive any termination, payoff or transfer of your financing contract. If any part of this Arbitration Agreement, other than waivers of class action rights, is deemed or found to be unenforceable for any reason, the remainder shall remain enforceable.

Notice to Buyer: When you sign this Arbitration Agreement, you are agreeing that if a Claim arises that it is covered by this Agreement. You are giving up rights you might have to litigate such Claims in a court or before a jury or to participate in a class action with respect to such a Claim. Other rights that you would have if you went to court may not be available or be more limited in arbitration. It is important that you read this entire Arbitration Agreement carefully before you sign it.

 04/11/2018
 Buyer Signature Date
 04/11/2018
 Co-Buyer Signature Date

STOKES BROWN TOYOTA OF HILTON HEAD

By: 
 Title: _____

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF BEAUFORT)
) FOURTEENTH JUDICIAL CIRCUIT
) C.A. No. 2020-CP-07-00091
Barbara Killingsworth and Brian)
Killingsworth,)
) Plaintiffs,) **AFFIDAVIT OF BRYAN COOLER**
v.)
) Stokes Brown Toyota of Hilton Head,)
Defendant,)
_____)

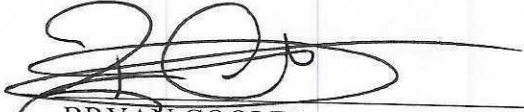
PERSONALLY APPEARED before me, the undersigned, who being duly sworn, deposes and says as follows:

1. My name is Bryan Cooler. I am over the age of eighteen (18) and am legally competent to make this affidavit. This affidavit is based upon my personal knowledge of the facts stated herein.
2. I am the General Manager at Stokes Toyota Hilton Head. I have been with Stokes Toyota Hilton Head for 23 years, and am quite familiar with the sales process for our customers.
3. The sales process consists of many interrelated steps. First, we must provide a sufficient inventory for the customer to make a choice. This is done by having several alternatives, attractively displayed on our lot. Lighting and attractive grassy areas compliment this presentation.
4. The parking lot at Stokes Toyota Hilton Head is an extension of the showroom and is where 99% of the vehicles are displayed for sale.
5. The appearance and lighting of the parking lot is critical to create an inviting customer experience and to draw attention to the vehicles.

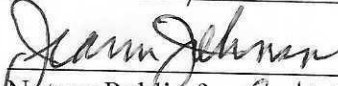
6. Stokes Toyota Hilton Head is subject to the Community Development Code of Beaufort County, which regulates the landscape medians required in the parking lot as well as the exterior lighting.
7. Once the customer selects the desired car, a negotiation takes place and a price is agreed upon.
8. Then, the customer is sent to a Business Manager to sign the documents pertaining to the sale.
9. The last document signed is an Arbitration Agreement.
10. It is common for sales to occur in the evening; therefore, the lot is illuminated at the maximum level allowed by Ordinance in order to showcase the vehicles being sold, light walking areas, and provide security.
11. The purchase process includes the customer taking physical possession of the car. In order to finance the purchase, Stokes Toyota warrants to the lender that the customer is taking possession of the car being financed.
12. Customers regularly take delivery of their cars in the area of the parking lot where Mrs. Killingsworth's accident occurred.
13. The sales associate accompanies the purchaser to the designated area of the parking lot where the newly cleaned car is waiting. The sales associate will then review the operation of any features of the car with which the customer may be unfamiliar, which could range from seat positioning to programming of blue tooth or navigation.

[Signature on following page]

THE AFFIANT FURTHER SAYETH NOT.


BRYAN COOLER

SWORN TO before me this 12th
day of May, 2020.


Notary Public for South Carolina

My Commission Expires: 05/28/2024



STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

Barbara Killingsworth and Brian Killingsworth,

Plaintiffs,

v.

Stokes Brown Toyota of Hilton Head,
Defendant,

) IN THE COURT OF COMMON PLEAS

) FOURTEENTH JUDICIAL CIRCUIT

) C.A. No. 2020-CP-07-00091

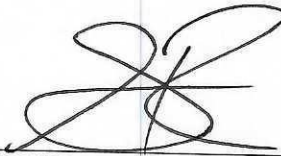
) AFFIDAVIT OF SHAWN RICHARDSON

PERSONALLY APPEARED before me, the undersigned, who being duly sworn, deposes and says as follows:

1. My name is Shawn Richardson. I am over the age of eighteen (18) and am legally competent to make this affidavit. This affidavit is based upon my personal knowledge of the facts stated herein.
2. I am a Business Manager at Stokes Toyota Hilton Head. I have been with Stokes Toyota Hilton Head for 7 years.
3. Plaintiffs signed a number of documents as part of the purchase process, the last of which was the Arbitration Agreement. A copy of the Agreement signed by Mr. and Mrs. Killingsworth is attached as Exhibit A.
4. I reviewed the Arbitration Agreement with Mr. and Mrs. Killingsworth. They had the opportunity to read all paperwork prior to signing and to have it explained to them if they didn't understand it. They did not indicate that they could not read or write, or were unable to understand the paperwork, including the Arbitration Agreement.
5. Mr. and Mrs. Killingsworth signed the Arbitration Agreement, which is a stand-alone document, without objection. I signed the same Arbitration Agreement on behalf of Stokes Toyota.


6. At all times that I met with Mr. and Mrs. Killingsworth, they appeared capable of understanding the purpose of the Arbitration Agreement, that it related to any matter arising out of their purchase, and the fact it would affect their right to a jury trial.
7. Upon completing the paperwork, Barbara Killingsworth accompanied the salesman, Chris Browne, to the customer delivery area of the parking lot so she could take delivery of the car.
8. At the time Mrs. Killingsworth was walking to her car, the parking lot was brightly lit up and I saw no areas that were unsafe to walk.

THE AFFIANT FURTHER SAYETH NOT.



SHAWN RICHARDSON

SWORN TO before me this 12th
day of May, 2020.


Notary Public for South Carolina

My Commission Expires: 05/28/2024



ARBITRATION AGREEMENT

DATE: 04/11/2018 VEHICLE DESCRIPTION: 2008 TOYOTA TRUCK HIGHLANDER
 VEHICLE IDENTIFICATION NUMBER: [REDACTED] 07382

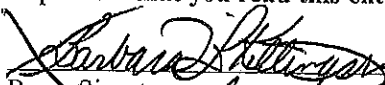

In this Arbitration Agreement, "you" refers to the buyer(s) signing below. "We", "us", and "our" refer to the Dealer signing below and anyone to whom the Dealer assigns this Arbitration Agreement.

Any claim or dispute, whether in contract, tort, statute or otherwise (including the interpretation and scope of this Arbitration Agreement, and the arbitrability of the claim or dispute), between you and us or our employees, agents, successors or assigns, which arise out of or relate to the vehicle described above, your credit application, your purchase of this vehicle, your purchase of any additional products or services (e.g. service agreements, extended warranties, credit insurance, GAP insurance or waivers and the like), the financing of your purchase of the vehicle, repairs to and servicing of the vehicle or any matters related thereto (a "Claim") shall, at your or our election, be resolved by neutral, binding arbitration and not by a court action. Any Claim is to be arbitrated by a single arbitrator on an individual basis and not as a class action. You expressly waive any right you may have to arbitrate a class action. You may choose one of the following arbitration organizations and its applicable rules: the National Arbitration Forum, Box 50191, Minneapolis, MN 55405-0191 (www.arb-forum.com), the American Arbitration Association, 335 Madison Ave., Floor 10, New York, NY 10017-4605 (www.adr.org), or any other organization that you may choose subject to our approval. You may get a copy of the rules of these organizations by contacting the arbitration organization or visiting its website.

Arbitrators shall be attorneys or retired judges and shall be selected pursuant to the applicable rules. The arbitrator shall apply governing substantive law in making an award. The arbitration hearing shall be conducted in the federal district where this Arbitration Agreement was executed. On any claim you file, you will pay the first \$50 of the filing fee. At your request we will pay the remainder of the filing fee and any administrative or hearing fees charged by the arbitration administrator on any claim submitted by you in arbitration up to a maximum of \$1000, which may be reimbursed by decision of the arbitrator at the arbitrator's discretion. Each party shall be responsible for its own attorney, expert and other fees, unless awarded by the arbitrator under applicable law. However, notwithstanding the foregoing, it is understood that we will pay any costs and fees of arbitration that the arbitrator decides we must pay to assure that this arbitration provision is enforceable. If the chosen arbitration organization's rules conflict with this Arbitration Agreement, then the provisions of this Arbitration Agreement shall control. Any arbitration under this Arbitration Agreement shall be governed by the Federal Arbitration Act (9 U.S.C. § 1 et.seq.) and not by any state law concerning arbitration.

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Notice to Buyer: When you sign this Arbitration Agreement, you are agreeing that if a Claim arises that it is covered by this Agreement. You are giving up rights you might have to litigate such Claims in a court or before a jury or to participate in a class action with respect to such a Claim. Other rights that you would have if you went to court may not be available or be more limited in arbitration. It is important that you read this entire Arbitration Agreement carefully before you sign it.

 04/11/2018
 Buyer Signature Date
 04/11/2018
 Co-Buyer Signature Date

STOKES BROWN TOYOTA OF HILTON HEAD

By: 
 Title: _____

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF BEAUFORT

CIVIL ACTION NO.: 2020-CP-07-00091

Barbara Killingsworth and Brian Killingsworth,

Plaintiffs,

v.

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO MOTION TO COMPEL ARBITRATION

Stokes Brown Toyota of Hilton Head,

Defendant.

FACTUAL BACKGROUND

This is a personal injury case which arises out of Barbara Killingsworth’s horrific fall at a car dealership lot owned by the Defendant Stokes Brown Toyota (hereafter “the Dealer”). On the evening of April 11, 2018, Mr. and Mrs. Killingsworth – a married couple in their 60’s - had completed their car purchase, and the lights were turned off in the parking lot area as they proceeded to walk over to their car to drive home.¹ The parking lot was dark and Mrs. Killingsworth tripped over an unlit, hidden, and obscured curb, causing grievous harm.² Plaintiffs brought suit for personal injuries and loss of consortium arising out of Mrs. Killingsworth’s injuries.³

¹ It is unknown whether the Dealer’s employee shut off the lights in the parking lot or whether the lights were on an automatic timer, as discovery is ongoing. Dealer disputes that the lights were off.

² Mrs. Killingsworth’s medical bills to date are in excess of \$110,000.

³ The Plaintiffs are raising their young grandchild and, in addition to having to shoulder housework and the impact on their marital relationship, Mr. Killingsworth has also been a significant caregiver for the child.

Dealer now seeks to compel arbitration of these claims, alleging that the parties intended to arbitrate such personal injury claims by virtue of executing an arbitration agreement as part of their purchase of a 2008 Toyota Highlander on the evening in question. See Exhibit A (arbitration agreement). Because these tort claims are outside the scope of the arbitration clause and do not arise out of or relate to “the vehicle...your credit application, your purchase of this vehicle, your purchase of any additional products or services...the financing of your purchase of the vehicle, [or] repairs to and serving of the vehicle or any matters related thereto...”, the Motion should be denied.

To find - as the Defendant asserts – that there is a causal connection between the vehicle purchase agreement and these personal injury claims is to attach a “but for” causation standard that would include essentially every dispute imaginable. Our Supreme Court has rejected such an overly broad view of arbitration agreements, finding such an interpretation “illogical and unconscionable.” See, e.g., Aiken v. World Fin. Corp. of S.C., 373 S.C. 144, 644 S.E.2d 705 (2004) (and cases cited therein).⁴ Dealer fails to cite a single South Carolina case which provides that bodily injury and loss of consortium claims are within the scope of an arbitration agreement arising out of a vehicle sales transaction, and can point to no South Carolina case that supports its argument that the scope of this agreement is unlimited.⁵ Likewise, this is not a case about “passage of title” or “delivery of goods”, as the Dealer urges.

⁴ Defendant relies upon a number of cases which involve arbitration of tort claims within employment scenarios; these are unpersuasive, as a bargained-for employment relationship is totally distinct from an invitee injured on the premises of a retail business.

⁵ The sole case concerning bodily injury that Dealer relies upon is a memorandum opinion from the United States District Court for the Eastern District of Pennsylvania, which has no precedential value in South Carolina.

LEGAL STANDARD

Not even the broadest arbitration provision applies when the claim and the parties' contract lack a "significant relationship." Aiken v. World Fin. Corp. of S.C., 373 S.C. 144, 151, 644 S.E.2d 705, 709 (2004) (emphasis added). No matter how broadly worded an arbitration contract is written, generally applicable contract law holds that its scope cannot be unbounded. Landers v. Fed. Deposit Ins. Corp., 402 S.C. 100, 115, 739 S.E.2d 209, 217 (2013) ("even the broadest of [arbitration] clauses have their limitations"). "[Arbitration] is predicated on an agreement to arbitrate because parties are waiving their fundamental right to access to the courts." Wilson v. Willis, 426 S.C. 326, 827 S.E.2d 167 (S.C. 2019). "[A] party seeking to compel arbitration under the FAA must establish that (1) there is a valid agreement, and (2) the claims fall within the scope of the agreement . . . While the presumption in favor of arbitration applies to the scope of an arbitration agreement, it does not apply to the existence of such an agreement..." 827 S.E.2d 173.

ARGUMENT

Our Supreme Court's "significant relationship" test under Aiken requires a meeting of the minds in order to form a contract – in the instant case, there can be no agreement to arbitrate a personal injury claim that is so far removed from the subject matter of the contract. Put simply, there was no meeting of the minds here; to find otherwise would allow any retail business to include the word "tort" in its customer's sales paperwork, and then avoid a jury trial when that same customer is hit by a falling awning on their way down the steps after completing their purchase. By the Dealer's reasoning, the scope of the arbitration agreement is unlimited and encompasses these personal injury claims because the Plaintiffs were required to take walk out to

the parking lot to retrieve the vehicle, and thus Mrs. Killingsworth's fall is part of the sales transaction. Such an overbroad, nonsensical interpretation of this contract should be rejected by this Court.

In Aiken, employees of a consumer lender were accused of taking borrowers' personal identifying information (e.g. social security numbers and dates of birth) and misappropriating them to obtain sham loans in the borrowers' name. 373 S.C. at 146-47, 644 S.E.2d at 707. The borrowers alleged negligent and intentional tort claims against the lender, which defended by citing an arbitration provision in the lender's legitimate loan contract with each borrower. Id. The Court was tasked with determining whether the admittedly broad arbitration provision from the borrower-lender contract extended to cover the borrower's claims based on the brazen, but unrelated, misconduct of the lender's employees. Id. at 147, 644 S.E.2d at 708.

Accordingly, Aiken presented a garden-variety contract interpretation question and was resolved using standard contract interpretation rules. Id. at 151, 644 S.E.2d at 709 (couching its holding in "general principles of contract law"). The Court first evoked the "mutual assent" requirement to conclude that **"arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit."** Id. at 149, 644 S.E.2d at 708 (citing Zabinski v. Bright Acres Assocs., 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001)) (emphasis added).

Thus, while fully crediting state and federal pro-arbitration policy, Aiken held that **"even the most broadly-worded arbitration agreements still have limits."** Aiken, 373 S.C. at 151, 644 S.E.2d at 709; See also Landers, 402 S.C. at 115, 739 S.E.2d at 217. The "significant relationship" test the Court in Aiken used to determine the limits of a broadly-worded arbitration contract is simply an application of the mutual assent rule that applies to every contract regardless

of its subject matter.⁶ In Aiken, the Court rejected the argument that because Aiken’s contracts with World Finance gave the conspirators access to his personal information (which allowed them to commit the crimes), there was a “significant relationship” between his claims and the underlying loan agreement, thereby requiring arbitration. The Court found the argument was unpersuasive, noting that the defendant was applying what amounted to a “but for” causation standard which would essentially include every dispute imaginable between the parties. Id. See also Seifert v. U.S. Home Corp., 750 So.2d 633, 638 (Fla.1999) (“[T]he mere fact that the dispute would not have arisen but for the existence of the contract and consequent relationship between the parties is insufficient by itself to transform a dispute into one ‘arising out of or relating to’ the agreement.”); The Vestry and Church Wardens of the Church of the Holy Cross v. Orkin Exterminating Co., Inc., 356 S.C. 202, 209, 588 S.E.2d 136, 140 (Ct.App.2003) (“[T]he mere fact that an arbitration clause might apply to matters beyond the express scope of the underlying contract does not alone imply that the clause should apply to every dispute between the parties.”) (cited with approval in Aiken v. World Finance Corp. of SC, 644 S.E.2d 705, 373 S.C. 144 (S.C. 2007))

Similarly, here, under the Dealer’s interpretation of the arbitration agreement, any customer of Stokes who was ever injured at the dealership (whether hit by a car driven by a drunk employee while waiting for an oil change, or shot by a just-fired dealership employee while dropping their car off to be detailed, or assaulted in a restroom before receiving delivery of their vehicle) would be required to arbitrate their claims for personal injuries. Such a result is “illogical and unconscionable” under South Carolina law. Id. There is no significant relationship between

⁶ The “significant relationship” test is not a South Carolina-specific rule. Many other jurisdictions use this analysis to determine the boundaries of a broadly worded arbitration provision. See e.g. Wachovia Bank, N.A. v. Schmidt, 445 F.3d 762, 767 (4th Cir. 2006) (quoting J.J. Ryan & Sons v. Rhone Poulenc Textile, S.A., 863 F.2d 315, 321 (4th Cir. 1988)); Jackson v. Shakespeare Found., Inc., 108 So.3d 587, 593 (Fla. 2013); Griggs v. Evans, 43 A.3d 1081, 1088 (Md. App. 2012).

the fall from a curb in an unlit parking lot and the purchase and financing of the Toyota vehicle – put simply, there is no way that the Plaintiffs could have anticipated having to submit their catastrophic personal injury claims to arbitration when they were in the finance office that evening buying a 2008 Toyota.

The connection between core contract rules and the scope of arbitration is further evidenced by the three (3) post-Aiken cases applying the exception. All three held the exception was nothing more than an application of the rule requiring courts to interpret a contract consistently with its parties' intent. In Chassereau v. Global Sun Pools, Inc., 373 S.C. 168, 644 S.E.2d 718 (2007), a woman who financed a swimming pool was not compelled to arbitrate her claim that the pool seller's agents defamed and harassed her when she fell behind on her payments. Chassereau examined the broadly worded arbitration provision carefully but, given the lack of connection between the sales contract and the defamation claim, the court was left with “no doubt that [the woman] *did not intend to arbitrate*” the claim. 373 S.C. at 172, 644 S.E.2d at 721 (emphasis added); See also Partain v. Upstate Automotive Group, 386 S.C. 488, 689 S.E.2d 602 (2010) (holding that a car buyer “did not intend to submit” to arbitration his claim that a dealer maliciously switched the agreed-upon car with an inferior model).

Similarly, this Court has held that an arbitration provision in a financial services contract between investor and advisor did not cover negligence or consumer fraud claims because the prospect of an advisor converting his client's funds for personal use was “not within the parties' contemplation” when the contract was formed. Hatcher v. Edward D. Jones & Co., L.P., 379 S.C. 549, 554, 666 S.E.2d 294, 297 (Ct. App. 2008) (finding misconduct underlying negligence claim was “completely outside the expectations of the parties at the time the contract was entered”). Hatcher went one step further, holding that to interpret a broadly worded arbitration provision to

apply to claims wholly unforeseeable at contract formation would be inconsistent with pro-arbitration policy by contravening the parties' intentions. *Id.* Much like the plaintiff in *Hatcher*, here Mr. and Mrs. Killingsworth could never have expected that by signing the financing paperwork, they were agreeing to give up their right to a jury trial for their personal injury claims.⁷

The Dealer urges this Court to find that “*any interpretation covering the dispute is all that is required.*” Def. Br. at p. 4. Plaintiffs respectfully submit that the Court should reject this erroneous interpretation of South Carolina jurisprudence; our Supreme Court has made clear that a “significant relationship” is required; here, none exists. Perhaps if the Plaintiffs’ credit was negligently reported by the Dealer – a tort actually related to the financing of the car – then such a tort could reasonably be found to be within the scope of this arbitration agreement. However, catastrophic personal injuries are not credibly within the scope of this Agreement and were never foreseeable at the time of execution; accordingly, the Motion should be denied.

CONCLUSION

“The purpose of the rules of contract construction is to ascertain the intention of the parties as gathered from the contents of the entire document and not from any particular provision within the contract. Where one interpretation of a contract makes it unusual or extraordinary and another interpretation, equally consistent with the language employed, would make it reasonable, fair, and just, the latter construction prevails. An interpretation which establishes the more reasonable and probable agreement of the parties should be adopted while an interpretation leading to an absurd result should be avoided.” *Koon v. Fares*, 666 S.E.2d 230, 379 S.C. 149 (S.C. 2008).

⁷ The plain language of the Agreement specifically limits the scope of the agreement to those which relate to the vehicle described on the face of the document, to wit: “[a]ny claim or dispute . . . which arise out of or relate to the vehicle described above. . .”. Plaintiffs’ claims arising out of this fall would exist if they were merely browsing, as they are not tied to either the specific vehicle or their buyer status; rather, they arise out of their invitee status on the premises.

Because the Plaintiffs' claims are so far removed from the subject matter of the contract and outside its scope, the motion should be denied and the case allowed to proceed to trial by jury.

Respectfully submitted,

s/Rachel G. Peavy

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Attorney for Plaintiffs

May 13, 2020

Columbia, South Carolina

ARBITRATION AGREEMENT

DATE: 04/11/2018 VEHICLE DESCRIPTION: 2008 TOYOTA TRUCK HIGHLANDER
VEHICLE IDENTIFICATION NUMBER: [REDACTED] 07302

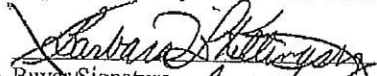
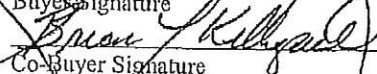
In this Arbitration Agreement, "you" refers to the buyer(s) signing below. "We", "us", and "our" refer to the Dealer signing below and anyone to whom the Dealer assigns this Arbitration Agreement.

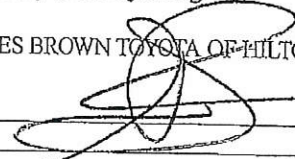
Any claim or dispute, whether in contract, tort, statute or otherwise (including the interpretation and scope of this Arbitration Agreement, and the arbitrability of the claim or dispute), between you and us or our employees, agents, successors or assigns, which arise out of or relate to the vehicle described above, your credit application, your purchase of this vehicle, your purchase of any additional products or services (e.g. service agreements, extended warranties, credit insurance, GAP insurance or waivers and the like), the financing of your purchase of the vehicle, repairs to and servicing of the vehicle or any matters related thereto (a "Claim") shall, at your or our election, be resolved by neutral, binding arbitration and not by a court action. Any Claim is to be arbitrated by a single arbitrator on an individual basis and not as a class action. You expressly waive any right you may have to arbitrate a class action. You may choose one of the following arbitration organizations and its applicable rules: the National Arbitration Forum, Box 50191, Minneapolis, MN 55405-0191 (www.arb-forum.com), the American Arbitration Association, 335 Madison Ave., Floor 10, New York, NY 10017-4605 (www.adr.org), or any other organization that you may choose subject to our approval. You may get a copy of the rules of these organizations by contacting the arbitration organization or visiting its website.

Arbitrators shall be attorneys or retired judges and shall be selected pursuant to the applicable rules. The arbitrator shall apply governing substantive law in making an award. The arbitration hearing shall be conducted in the federal district where this Arbitration Agreement was executed. On any claim you file, you will pay the first \$50 of the filing fee. At your request we will pay the remainder of the filing fee and any administrative or hearing fees charged by the arbitration administrator on any claim submitted by you in arbitration up to a maximum of \$1000, which may be reimbursed by decision of the arbitrator at the arbitrator's discretion. Each party shall be responsible for its own attorney, expert and other fees, unless awarded by the arbitrator under applicable law. However, notwithstanding the foregoing, it is understood that we will pay any costs and fees of arbitration that the arbitrator decides we must pay to assure that this arbitration provision is enforceable. If the chosen arbitration organization's rules conflict with this Arbitration Agreement, then the provisions of this Arbitration Agreement shall control. Any arbitration under this Arbitration Agreement shall be governed by the Federal Arbitration Act (9 U.S.C. § 1 et.seq.) and not by any state law concerning arbitration.

Any court having jurisdiction may enter judgment on the arbitrator's award. This Arbitration Agreement shall survive any termination, payoff or transfer of your financing contract. If any part of this Arbitration Agreement, other than waivers of class action rights, is deemed or found to be unenforceable for any reason, the remainder shall remain enforceable.

Notice to Buyer: When you sign this Arbitration Agreement, you are agreeing that if a Claim arises that it is covered by this Agreement. You are giving up rights you might have to litigate such Claims in a court or before a jury or to participate in a class action with respect to such a Claim. Other rights that you would have if you went to court may not be available or be more limited in arbitration. It is important that you read this entire Arbitration Agreement carefully before you sign it.

 04/11/2018
Buyer Signature Date
 04/11/2018
Co-Buyer Signature Date

STOKES BROWN TOYOTA OF HILTON HEAD
By: 
Title: _____

<p>STATE OF SOUTH CAROLINA</p> <p>COUNTY OF BEAUFORT</p> <p>Barbara Killingsworth and Brian Killingsworth,</p> <p style="text-align: right;">Plaintiffs,</p> <p>v.</p> <p>Stokes Brown Toyota of Hilton Head,</p> <p style="text-align: right;">Defendant,</p> <hr style="width: 30%; margin-left: 0;"/>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>IN THE COURT OF COMMON PLEAS</p> <p>C.A. No. 2020-CP-07-00091</p> <p style="text-align: center;">DEFENDANT’S REPLY MEMORANDUM IN SUPPORT OF MOTION TO STAY AND COMPEL ARBITRATION</p>
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Plaintiffs’ Arbitration Agreement is subject to the FAA and federal substantive law regarding arbitrability controls. *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614 (1985). “The heavy presumption of arbitrability requires that when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration.” *Landers v. Fed. Deposit Ins. Corp.*, 402 S.C. 100, 103, 739 S.E.2d 209, 213 (2013). Such a presumption is strengthened when an arbitration clause is broadly written. *Id.*

Plaintiffs signed a stand-alone Arbitration Agreement that indeed is broadly written:

Any claim or dispute, whether in contract, **tort**, statute or otherwise . . . which arise out of **or relate to** . . . your purchase of this vehicle . . . **or any matters related thereto** (a “Claim”) shall, at your or our election, be resolved by neutral, binding arbitration and not by a court action. (emphasis added)

Plaintiffs do not dispute the existence of the Arbitration Agreement, only whether their causes of action fall within its scope. Therefore, the heavy presumption in favor of arbitration applies.¹

Contrary to Plaintiffs’ suggestion, Stokes is not arguing the scope of the Arbitration Agreement is unlimited; however, it is broadly written and must be interpreted broadly and expansively. *Id.* To decide whether an arbitration agreement encompasses a dispute, this Court

¹ *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *Carolina Care Plan, Inc. v. United Healthcare Servs., Inc.*, 361 S.C. 544, 606 S.E.2d 752 (2004).

must determine whether the factual allegations underlying the claim are within the scope of the broad arbitration clause,² not whether Plaintiff can articulate a scenario outside the scope of the arbitration agreement in which she also could have been injured. In the present case, Plaintiff was still in the process of purchasing the Highlander when her alleged injuries occurred. Taking delivery of the car is a required part of the process.

The cases relied upon by Plaintiffs precede the United States Supreme Courts' increasingly strong policy favoring arbitration beginning with *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).³ Plaintiffs' discussion of the "significant relationship" test in *Aiken v. World Finance*, 373 S.C. 144, 644 S.E.2d 705 (2004) (not analyzed under the FAA) overlooks the fact that the test has since been clarified to reflect the fact that the liberal federal policy favoring arbitration requires that a court send a claim to arbitration "when presented with a broad arbitration clause ... as long as the underlying factual allegations simply 'touch matters covered by' the arbitration provision". *Landers*, 402 S.C. at 116, 739 S.E.2d at 217. "Under the expansive reach of the FAA a tort claim need not raise an issue that requires reference to or the construction of some portion of the contract in order to be encompassed by a broadly-worded arbitration clause." *Id.*, 402 S.C. at 111, 739 S.E.2d at 214.

Plaintiffs agreed to arbitrate any torts that "arise out of or relate to" the purchase of their vehicle "or any matters related thereto." The "touch matters" analysis is required to enforce the language of the arbitration agreement, which only requires that the claims "relate to" the agreement. *Id.* 402 S.C. at 117, 739 S.E.2d at 218. Surely, taking possession of your car relates to

² *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

³ Even before *Concepcion*, the South Carolina Supreme Court had held that unless a court can say with positive assurance that the agreement is not susceptible to an interpretation that covers the dispute, arbitration is required. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 597, 553 S.E.2d 110, 118 (2001).

its purchase.

The cases cited by Plaintiff are also factually distinguishable. Plaintiff alleges that she was injured while in the process of purchasing the Highlander. In *Aiken v. World Finance, supra*, it was only after Aiken had paid off his last loan that World Finance employees began using his personal information to obtain sham loans. Likewise, in *Chassereau v. Global Sun Pools*, 373 S.C. 168, 644 S.E.2d 718 (2007) the plaintiff claimed employees began harassing her when she stopped making payments after her pool had been installed. Additionally, in the cases cited by Plaintiffs, the court was faced with the question of whether outrageous torts were unforeseeable to a reasonable consumer in the context of normal business dealings.⁴ In the present case, taking physical possession of the Highlander was required and therefore, an injury sustained while in the act of taking physical possession, was foreseeable to the Plaintiffs.

Plaintiffs argue that Stokes has not cited a South Carolina case providing bodily injury or loss of consortium are within the scope of an arbitration agreement entered into as part of a vehicle sales transaction. Plaintiffs have similarly not cited a South Carolina finding that such causes of action are not within the scope of arbitration.⁵ It is Plaintiffs' burden to rebut the heavy presumption that the Arbitration Agreement is enforceable, and they have failed to do so.⁶

⁴ *Partain v Upstate Automotive Group*, 386 S.C. 488, 689 S.E.2d 602 (2010) (finding Partain could not have foreseen that Upstate Auto, after completing a sale, would substitute an entirely different vehicle in place of the truck he had agreed to purchase); *Hatcher v. Edward D. Jones & Co., L.P.*, 379 S.C. 549, 666 S.E. 2d 294 (Ct. App. 2008) (SCUTPA and negligence claims found to be outside the scope of the arbitration agreement because they were based on the wrongful electronic transfer of Hatcher's funds at the direction of a third party and without Hatcher's prior consent.)

⁵ Stokes has cited a case from the United States District Court for the Eastern District of Pennsylvania (a federal Court interpreting federal substantive law) which is instructive. *See Ellin v. Empire Today, LLC*, C.A. 11-2312 (E.D. Pa. 2011) (finding injuries sustained when plaintiff was struck by carpet installers negligently moving a piece of furniture were related to the arbitration agreement because Empire Today had an obligation under the contract to install carpet, which included moving furniture). In the present case, Stokes had an obligation to convey physical possession of the Highlander to the Plaintiffs, which included Plaintiff walking to the car so it could be driven home.

⁶ *Green Tree Fin. Corp. – Ala. v. Randolph*, 531 U.S. 79, 91 (2000).

CONCLUSION

Plaintiffs' causes of action touch matters covered by the Arbitration Agreement. In light of the strong presumption of arbitrability under the FAA, Plaintiffs' personal injury claims fall within the scope of the broadly written Arbitration Agreement. For the foregoing reasons, this Court should require the Plaintiffs to compel arbitration and stay the case.

Respectfully submitted,

May 14, 2020

s/Bradford N. Martin
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**ATTORNEYS FOR DEFENDANT
STOKES MOTORS, INC. d/b/a STOKES
TOYOTA OF HILTON HEAD**

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF BEAUFORT)	
)	
Barbara Killingsworth and Brian Killingsworth,)	C.A. No. 2020-CP-07-00091
)	
Plaintiffs,)	DEFENDANT’S MOTION
v.)	TO ALTER OR AMEND
)	
Stokes Brown Toyota of Hilton Head,)	
Defendant,)	
_____)	

TO: PLAINTIFFS AND THEIR ATTORNEY, RACHEL G. PEAVY, ESQ.:

YOU WILL PLEASE TAKE NOTICE that the undersigned, as attorneys for Defendant, Stokes Brown Toyota of Hilton Head, whose true name is Stokes Motors, Inc. d/b/a Stokes Toyota of Hilton Head, will move before the Honorable Carmen T. Mullen, at such time and place as Judge Mullen may designate, pursuant to Rules 52(b) and 59(e) of the South Carolina Rules of Civil Procedure, to reconsider, alter, or amend her Order filed May 22, 2020, denying Defendant’s Motion to Stay and Compel Arbitration. Defendant’s Motion is based on the following:

1. Both Plaintiffs signed a stand-alone document during the paperwork phase of the purchase. It was labeled in large bold capital letters: “**ARBITRATION AGREEMENT.**” The Agreement provided:

ARBITRATION AGREEMENT

Any claim or dispute, whether in contract, tort, statute or otherwise . . . which arise out of or relate to . . . your purchase of this vehicle . . . or any matters related thereto (a “Claim”) shall, at your or our election, be resolved by neutral, binding arbitration and not by a court action.

2. The Court’s Order failed to address the fact that a dealership’s lot is an extension of its showroom and the Plaintiffs were still in the process of purchasing their car, since they had not yet taken physical possession, when the alleged fall occurred.

3. Both of Plaintiffs' causes of action (Negligence and Loss of Consortium) are torts that "arise out of or relate to" the purchase of the vehicle, or "any matter related thereto" since the injuries Plaintiffs claim occurred while they were completing the purchase process.

4. Plaintiffs expressly agree to arbitrate any claim in tort by signing the Arbitration Agreement. The Court's Order failed to address this point.

5. The Court's Order erroneously applied the "substantial relationship" test set forth in *Aiken v. World Finance*, 373 S.C. 144, 644 S.E.2d 705 (2004) rather than the test set out in *Landers v. Fed. Deposit Ins. Corp.*, 402 S.C. 100, 739 S.E.2d 209 (2013), a subsequent and controlling South Carolina Supreme Court opinion.

6. The Court's Order failed to address why the *Landers* test did not apply.

7. The Court's Order failed to apply the federal substantive law to this Arbitration Agreement as required by *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) and *Landers*.

8. The Court's Order failed to address the applicable "touch matters" standard set forth in *Landers, supra*.

9. The Court's Order overlooked the fact that any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. *Landers, supra*.

10. The Court's Order overlooked that the heavy presumption of arbitrability requires that when the scope of the arbitration clause is open to question, a Court must decide the question in favor of arbitration. *Landers, supra*.

11. The Court's Order failed to address why it did not apply the standard that unless it may be said with positive assurance that the Arbitration Agreement is not susceptible of an interpretation that covers the dispute, arbitration must generally be ordered. It cannot be said with positive assurance that agreeing to arbitrate a tort that occurs during the purchasing process of a vehicle does not relate to, or touch upon, the purchase.

12. The Court's Order overlooked the fact that Plaintiffs did not dispute the existence of the Arbitration Agreement, only whether their causes of action fall within its scope. Therefore, the heavy presumption in favor of arbitration applies, which was not addressed in the Court's Order.

13. The Court's Order overlooked the fact that Plaintiffs' Arbitration Agreement is broadly written; therefore, the heavy presumption of arbitrability is strengthened. *Id.*

14. The Court's Order overlooked the fact that under the expansive reach of the FAA, a tort claim need not raise an issue that requires reference to or the construction of some portion of the contract in order to be encompassed by a broadly-worded arbitration clause, as required by *Landers*.

15. The Court's Order failed to address why the Arbitration Agreement is not capable of an expansive reach as required by *Landers*.

16. The Court's Order failed to address, even assuming the arbitrability of the claims were in doubt, why the Arbitration Agreement did not require arbitration, as required by *Landers*.

17. All of these issues were raised before the Court and have not been ruled upon.

THEREFORE, the Defendant moves this Court for an Order altering or amending its May 22, 2020 Order denying Stokes Motors, Inc.'s Motion to Stay and Compel Arbitration.

May 27, 2020

Respectfully submitted,

s/Bradford N. Martin
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**ATTORNEYS FOR DEFENDANT
STOKES MOTORS, INC.**

1 In the Court of Common Pleas for the
2 State of South Carolina, County of Beaufort

3

4 Case No.: 2020CP0700091

5 Barbara Killingsworth,
6 Plaintiff(s),

7 vs.

Transcript of Record

8 Stokes Brown Toyota of
9 Hilton Head,

10 Defendant(s).

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16 May 15, 2020

17 HELD VIA COMPUTER USING THE ZOOM PROGRAM

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22 BEFORE:

23 The Honorable Carmen T. Mullen

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APPEARANCES

REPRESENTING PLAINTIFF(S) :

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REPRESENTING DEFENDANT(S) :

Bradford Neal Martin, Esquire

PO Box 10410

Greenville, SC 29603

1 PROCEEDINGS/ZOOM HEARING

2 THE COURT: Correct me if I am wrong, this is
3 Barbara Killingsworth versus Stokes Brown Toyota of
4 Hilton Head, correct?

5 MR. MARTIN: That's correct.

6 THE COURT: All right. Well, obviously this is
7 Defendant's motion to stay and compel arbitration.
8 Whenever you are ready, sir.

9 MR. MARTIN: Thank you. Well, good to see you
10 again. I haven't seen you since that crazy man, Mr.
11 Hackworth (phonetic), who has appealed us to the Court
12 of Appeals.

13 THE COURT: I know.

14 MR. MARTIN: And he's pro se. So, we are having a
15 lot of fun with that. But anyway, I hope that you are
16 doing well down on the coast, and I hope that you are
17 getting through this difficult time.

18 Anyway, Judge, this motion is pretty darn
19 straightforward. There seems to be only two areas of
20 dispute. The first thing is, it only concerns the
21 scope of the arbitration clause. I don't see any other
22 objections to this arbitration agreement other than the
23 scope. So, I think the only issue that we are going to
24 be talking about today is the scope out of the
25 arbitration clause. And it seems like the only dispute

1 really in the law is that we allege that Federal
2 substantive law applies and the Plaintiff alleges that
3 South Carolina law applies.

4 So, I think for those two issues, I think that we
5 can walk through this situation and get to the bottom
6 line pretty quickly.

7 THE COURT: Okay.

8 MR. MARTIN: The first thing that I want to tell
9 you about is the car buying process. I know it quite
10 well since I have represented car dealers for a long
11 time. But I think it's important to walk through how
12 the car buying process works in order to understand the
13 scope of an arbitration agreement when you buy a car.

14 First of all, it begins with usually a call or an
15 Internet search before the customer even comes to the
16 dealership. And it's not concluded until the customer
17 actually drives home with the car. So, it is a
18 continuous process, and usually we are required to have
19 sufficient inventory that we display attractively on
20 well landscaped and well lit lots at the dealership to
21 assist the customer in car selection and the ultimate
22 delivery of the car.

23 And this is the Stokes Toyota dealership in
24 Bluffton, you know on your way into Hilton Head. And
25 of course Toyota has all kinds of requirements, that

1 your building has to be nice and modern and requires us
2 to have a sufficient amount of inventory which costs a
3 lot, literally hundreds of thousands of dollars, just
4 to have the car sitting there so when the customer
5 comes in they get to walk around the lot and they get
6 to decide what they want to purchase a car.

7 In this particular situation, the Plaintiffs came
8 to the dealership on April 10th and returned on April
9 11th, I think that it was 2018. And by the 11th they
10 decided on a car, and this purchase process for them
11 started in -- was about to be completed in two days.
12 They first came and went ahead and picked out the car,
13 and unlike most retailers, Judge, a dealership's lot is
14 the extension of its showroom.

15 It's not like you go into a Best Buy and you just
16 park in the parking lot and go in and buy what you
17 want. But lots of the cars, maybe 80 percent or
18 90 percent of the cars, are literally outside on the
19 parking lot. So the way they are arranged, the way
20 they are cleaned, and the way they are lit up is very
21 important in helping someone choose what car they want.

22 So, we have an affidavit. Well, actually I have
23 some pictures, I sent some pictures for demonstrative
24 purposes. I know, Laura, you sent me an email saying
25 you got those pictures. It probably would be good to

1 look at those right now. Is there a way we can pull
2 those up? I'm not real good at this computer stuff.

3 THE COURT: I can tell you right now -- can you
4 hear me?

5 MR. MARTIN: I can, Judge. I can't see you but I
6 can hear you.

7 THE LAW CLERK: I can pull them up on my phone.

8 THE COURT: Everyone is frozen right now on my
9 screen. We are all kind of frozen. I can hear you
10 perfectly. And I have got pictures of everybody and
11 everyone is frozen, so I just have a picture. So,
12 Laura, what is the best way for us to be able to see
13 these photos?

14 THE LAW CLERK: I can pull them up on my email on
15 my phone and just hold them up. That is the only way I
16 can (audio break).

17 THE COURT: My only problem, Laura, is that you
18 are frozen so I don't think that I am going to see
19 anything that you hold up right now. So I need to call
20 in on my phone?

21 THE LAW CLERK: Yes, let me try to access the link
22 if you want to do that.

23 THE COURT: Okay. Give me one minute. And that
24 way maybe if we can hold them up then I can see them
25 okay. Okay? Give me a sec.

1 THE LAW CLERK: Okay, guys.

2 THE COURT: Now, of course, it is not letting me
3 even get out.

4 THE LAW CLERK: I can remove you from it if you
5 want.

6 THE COURT: Yeah, remove me from the meeting if
7 you would, thank you.

8 THE LAW CLERK: Okay. It should kick her out in
9 just a second and then she will be able to call in.

10 (Pause.)

11 THE LAW CLERK: There she is.

12 MR. MARTIN: Now we can see you, Judge.

13 THE COURT: Perfect and I am actually moving.
14 Perfect. Okay, thank you, y'all, I apologize. We were
15 having this problem yesterday, I don't know what is
16 going on. And I went and bought an Internet cable, but
17 apparently I have got issues. So anyway, I apologize.
18 So, let's go ahead and start looking at the photos.

19 MR. MARTIN: Okay.

20 THE LAW CLERK: Which one do you want me to put up
21 first?

22 MR. MARTIN: The first one is just the -- there is
23 a red car in front of the dealership. And, Judge, I
24 don't know if you can see that that well. But it goes
25 to show you that it is a perfectly landscaped

1 situation. The dealer is a very high-end, modern
2 facility.

3 THE COURT: Right.

4 MR. MARTIN: And the actual delivery of the car
5 was to the left. If you see the blue car in the -- I
6 mean the blue truck and the white truck, on the other
7 side is where the car was actually delivered. But this
8 just gives you an idea of what Stokes Toyota looks
9 like.

10 The second picture is a large picture of the
11 entire property. It is sort of a view from like a
12 helicopter. And it'll, it'll show you how critically
13 important all of the displays are and how all of the
14 new cars are lined up and parked carefully. And they
15 are all cleaned and the whole lot is very well
16 landscaped, and lots of -- lots of area to make it
17 safe.

18 But this just emphasizes the fact that this is
19 part of our showroom and that these are where the cars
20 are located that a customer would go and take a look at
21 and decide where to pick one. I don't (audio break)
22 dot right where it says, Stokes Toyota. Can you see
23 that?

24 THE COURT: Laura, can you hold it up?

25 THE LAW CLERK: Yes.

1 MR. MARTIN: Okay. Well, if you look right behind
2 it there is a car parked there. That is exactly where
3 the Plaintiff's car was on the night of her fall. She,
4 she was going out of the dealership to get the car
5 delivered right in that spot. So that --

6 MS. PEAVY: Your Honor --

7 MR. MARTIN: I wanted to show that.

8 THE COURT: Yes.

9 MR. MARTIN: Okay.

10 THE COURT: Yeah, go ahead.

11 MS. PEAVY: I was under the impression these
12 photos were going to be used for demonstrative purposes
13 only. Mr. Martin is arguing the facts of the case. We
14 are in discovery right now. I haven't had a chance to
15 depose any of his folks. So to the extent that he's
16 putting facts into evidence that I haven't had a chance
17 to discover, I have no problem with him giving Your
18 Honor a sense of the scope of the dealership and
19 property, but I don't want to get into the facts of the
20 evening in question, because that is obviously in
21 dispute.

22 THE COURT: Okay. I think he's just laying the
23 groundwork of kind of the process of -- correct me if I
24 am wrong, Mr. Martin, but selling a car and how it
25 takes and how it goes, and I understand certainly you

1 have argued in your brief that, I don't think that
2 there's any question that the grounds are an extension
3 of a showroom. But I guess to me it wouldn't be any
4 different than if someone, you know, tripped and fell
5 in a grocery store parking lot versus inside the store.
6 So, it is the same kind of thing.

7 I guess the question really is, is whether or not
8 the scope of the arbitration agreement would include
9 and did anticipate that while someone was in the
10 process of picking up their car that they bought or
11 completing their transaction, if they were to trip and
12 fall. I mean the truth is, I have never seen this
13 before. I mean, this is a little outside the normal,
14 and certainly also the simple fact that the lights were
15 turned off is really, I'm guessing, what caused this.

16 And it wouldn't have been a problem had that
17 occurred. But it is whether or not the scope of
18 arbitration anticipates or covers this.

19 MR. MARTIN: Right. Right.

20 THE COURT: So, I think that is really what we
21 need to talk about. So, I think I understand. I
22 certainly know where Stokes Brown Toyota Hilton Head
23 is. And I certainly understand, you know, how it's
24 kept. So, I think we just need to talk about, you
25 know, the scope of the clause, the arbitration

1 agreement so.

2 MR. MARTIN: Fair enough. Now, just as long as
3 you understand that the process of buying a car
4 includes walking the Plaintiff to her car. And usually
5 the last thing a salesman does is show her how the
6 Bluetooth connects and how everything works in the new
7 car. So, that just goes to show, and what is important
8 in the scope is, is that this is still in the purchase
9 process.

10 THE COURT: Okay.

11 MR. MARTIN: That is the emphasis and that is why
12 it's relevant to the scope of an arbitration agreement.

13 THE COURT: Okay.

14 MR. MARTIN: So, as far as the arbitration
15 agreement itself, if you turn to the arbitration
16 agreement it clearly is a very, very broadly worded
17 arbitration agreement. And it says, Any claim or
18 dispute -- any claim or dispute, whether in contract,
19 tort, statute, or otherwise. And the Plaintiff's
20 causes of action are tort causes of action. She is --
21 related to the fall. And I think loss of consortium.

22 So, any claim, whether contract, tort, statute or
23 otherwise which arise out of or relate to your purchase
24 of this vehicle or any matters related thereto. So, we
25 have related to the purchase, Or any matters related

1 thereto. This is what both Mister and
2 Mrs. Killingsworth signed the arbitration agreement.
3 It is a stand-alone agreement. And, like I said, there
4 is no other disputes about the agreement other than the
5 scope, okay.

6 THE COURT: Okay.

7 MR. MARTIN: So, now the next question is, well,
8 what law applies? Is this -- is this Federal
9 substantive law or is it South Carolina law? And
10 Justice Kittredge wrote a great opinion in the Landers
11 case in 2013. And I have had a lot of experience with
12 arbitration clauses because I was involved in those
13 class action causes of action with all of the car
14 dealers that Simpson Howe (phonetic) and Mike Spears
15 brought. It was the -- it actually went to the Supreme
16 Court, the Hendrick Honda case. That actually went to
17 the United States Supreme Court. And the world kind of
18 changed its (horn blowing) since the United States
19 Supreme Court decided the AT&T Mobility case.

20 And when that case was decided it really refocused
21 all state courts as to the importance of the Federal
22 Arbitration Act and how it absolutely required Federal
23 substantive law to apply. So, all of the cases cited
24 by Plaintiff are pre-2011. And luckily Justice
25 Kittredge in an unanimous opinion in 2013 in the

1 Landers case adopted the Federal substantive law after
2 the AT&T Mobility case.

3 And in that case, and I highly recommend that you
4 read it, he sets out seven principles that apply to
5 analyzing arbitration when you have Federal substantive
6 law applies. Number -- and this is at Page 7 -- it is
7 739S.E.2d at 213.

8 THE COURT: Okay.

9 MR. MARTIN: Once it's determined that FAA
10 applies, Federal Arbitration Act applies to the
11 dispute, Federal law regarding arbitrarily controls.
12 He says that clearly in the unanimous decision. I
13 don't think that there is any dispute that this
14 involves interstate commerce. Cases are clear when a
15 car -- this one actually came from Japan, so obviously
16 it follows interstate commerce. I don't think that is
17 a dispute.

18 So, once FAA applies, and of course the
19 Arbitration remand explicitly says the FAA applies.
20 Then Federal law regarding arbitrability controls.

21 Number two, the policy favors arbitration and any
22 doubts concerning the scope should be resolved in favor
23 of arbitration.

24 Number three, there is a heavy presumption of
25 arbitrability that requires that when the scope of the

1 arbitration clause is open to question the Court must
2 decide the question in favor of arbitration. Okay?
3 That is on Page 213.

4 Number four, such a presumption is strengthened
5 when the arbitration clause is broadly written. And
6 this is as broad as it can be, because it not only
7 says, Relates to the purchase, and then it says, Or any
8 other related thereto.

9 Number five, therefore, unless it may be said with
10 positive assurance that the arbitration clause is not
11 susceptible to an interpretation that covers the
12 asserted dispute, arbitration must generally be
13 ordered.

14 And then on Page 214 it gets the sixth principle
15 which says, Courts have held that such broad clauses
16 are capable of an expansive reach.

17 And then his seventh principle is, under the
18 expansive reach of the FAA, a tort claim need not raise
19 an issue that requires reference to or the construction
20 of some portion of the contract in order to be
21 encompassed by the broadly worded arbitration clause.

22 So, our whole point is under this very, very
23 strict standard of a heavy presumption, that
24 presumption must be rebutted by the Plaintiff in
25 order to avoid arbitration. Okay?

1 So, Ms. Peavy in her interpretations in her brief
2 she says she doesn't like this standard, she wants us
3 to apply what she calls a more reasonable and probable
4 interpretation. It says that on Page 7 of her brief.
5 But that is not the standard. The standard is this
6 heavy presumption in favor, and unless she can show
7 with actual assurance that this doesn't apply, then it
8 does apply. So, and under the expansive reach of the
9 FAA a tort claim need not rise to the issue that
10 requires reference to. Okay?

11 And although South Carolina (audio break) used the
12 term, Significant relationship. Justice Kittredge
13 addresses that in the Landers opinion and says, That
14 really doesn't mean significant relationship, what it
15 really means is that it only has to touch matters
16 covered by the arbitration agreement. Which really
17 kind of changes the law in South Carolina.

18 So, our whole case here is, is that, when a lady
19 and a gentleman are buying a car and in the process of
20 buying the car and delivery of the car is very
21 important, because not only does the customer get to
22 know how everything works, how to adjust the seat, how
23 to get your Bluetooth to work, how the lights work on
24 it, but the dealership is required to certify to the
25 lender that the customer has taken delivery. And

1 there's no dispute that this all happened before the
2 delivery was completed.

3 And there is no dispute that it was -- she was
4 literally walking from the room where she signed the
5 agreement to the car. So, we are saying that this
6 touches upon the dealership's delivery of the car,
7 touches upon the purchase of the car. And then if you,
8 if you just walk through the Landers case, which is the
9 Supreme Court of South Carolina's latest deference to
10 the Federal substantive law, it -- she cannot overcome
11 the presumption, a very heavy presumption in favor of
12 arbitration.

13 THE COURT: Okay.

14 MR. MARTIN: So, does that make sense?

15 THE COURT: It does make sense. Let me ask you a
16 question, I see where you are extending this to, in
17 fact, the delivery of the car. What would happen if
18 there was some type of tort claim or injury -- and I am
19 trying to figure out how you could do one that would be
20 negligence. If someone was actually delivering a car
21 to a buyer's house. Let's say you, I don't know, you
22 delivered a car to a buyer's house and let's say the
23 salesperson opens the door and somehow hits and injures
24 the buyer, would you then say it still goes underneath
25 this arbitration process? Would you say that is still

1 within the scope of it?

2 MR. MARTIN: Well, I would, of course, if I was
3 representing the client. If I was representing the
4 Plaintiff I probably wouldn't. But that is not your
5 focus today, you are supposed to look at the facts of
6 this case, this complaint, when you make the decision
7 on whether or not this arbitration clause applies to
8 these specific facts. So, my answer would be, Yes, if
9 I'm defending the dealership.

10 THE COURT: Right.

11 MR. MARTIN: But as far as your analysis today,
12 the facts are exactly as they are pled, she was walking
13 to her car to get into it to learn about the final
14 things she needed when she tripped and fell.

15 THE COURT: Is there any question about, that the
16 lights were turned out when she walked to the car?

17 MR. MARTIN: We have -- in fact, we have pictures
18 that the lights were on. In fact, they are not able to
19 be turned off. They are on automatically. That is a
20 fact that you don't need to worry about today. But,
21 yeah, it is totally 100 percent in dispute and once we
22 get to arbitration that will be presented.

23 One other thing, Judge, there is one case.
24 Because this is Federal substantive law, we have found
25 a Federal case from the Eastern District of

1 Pennsylvania that relies upon United States Supreme
2 Court authority and the Third Circuit authority that
3 said that when the Plaintiff's injuries were sustained
4 when she was struck by carpet installers in her house
5 when they negligently moved a piece of her furniture,
6 when their job was to install the carpet. She bought
7 it in the store, part of the contract was that they put
8 the carpet in the house. They moved one of her pieces
9 of furniture and hurt her, she sued, and the
10 Pennsylvania District Court ruled that it was covered,
11 that this negligent personal injury action, the bodily
12 injury, was covered under the Federal Arbitration Act.

13 THE COURT: Okay.

14 MR. MARTIN: So, and that is -- that is the only
15 case that is kind of close on the facts. You know, the
16 Landers case certainly dealt with torts, but it didn't
17 deal with a situation where you were purchasing
18 something and got injured during the purchase process.

19 THE COURT: Okay. Okay. All right. Let me hear
20 from opposing counsel.

21 MS. PEAVY: Thank you, Your Honor, Rachel Peavy
22 here at Hawk Law in Columbia, South Carolina. I
23 appreciate you taking the time to hear our response to
24 this motion today. And I hope that you can hear me.

25 THE COURT: I can.

1 MS. PEAVY: Okay, excellent. Your Honor, first of
2 all, looking at the arbitration agreement, clear on its
3 face, we contend that these claims do not arise out of
4 or relate to the vehicle described above, the 2008
5 Toyota Highlander. And the contract can only lead to
6 that conclusion. And the Defendant here is asking the
7 Court, we believe, to create new law that (audio break)
8 our State's clear directive in the World Finance cases
9 and its progeny. And that requires that there be a
10 significant relationship between the arbitration
11 contract and the claim. And that is a meeting of the
12 minds.

13 And even in a broadly worded arbitration
14 agreement, a tort claim such as this that is so remote
15 from the contract purpose, it can't be reasonably said
16 or intended that the parties could ever have intended
17 to arbitrate these catastrophic personal injury claims.
18 The Landers case does not overrule Aiken and its
19 progeny.

20 In the Landers case, the reason the tort claims
21 were found to relate and used in the scope of
22 arbitration was that the employment contract, where you
23 had a high-ranking bank executive who alleged that his
24 ability to do his job was compromised by the directives
25 and the conduct of his boss and not do his job in the

1 way he wanted to, so it would have been reasonably
2 anticipated that because of the significant
3 relationship between being a contractual employee for a
4 bank, executive, and any complaints or issues that you
5 had with your employer/employee relationship, obviously
6 that would be found within the scope of the arbitration
7 agreement. But in this arbitration agreement there is
8 nothing here that shows that there's any relationship,
9 never mind a significant relationship, between the
10 vehicle and this catastrophic fall.

11 THE COURT: Right.

12 MS. PEAVY: And we are urging the Court to adopt
13 what we contend is actually an unlimited scope of
14 arbitration under this contract. And I give you
15 hypotheticals in my memorandum. I don't know if the
16 Court has had a chance to read that or not. But under
17 their interpretation, and I noted this on Page 5, any
18 customer of Stokes who was ever injured at the
19 dealership would be required to arbitrate the claims
20 for personal injury.

21 So, if you are waiting for an oil change and
22 the -- you are hit by a car driven by a drunk employee,
23 or you are injured in a shooting by a just-fired
24 dealership employee while dropping your car off, or you
25 are assaulted in a restroom before receiving actual

1 delivery of the vehicle, all of that under the
2 Defendant's interpretation of this contract would be
3 arbitrable.

4 And I don't think that that's what our Supreme
5 Court has addressed in any of the cases that I have
6 cited here. It is an overly broad view and it is
7 illogical, and I think, unconscionable that this
8 arbitration agreement would appear to -- would be
9 something actually related to the financing of the
10 vehicle or the (audio break) of the vehicle.

11 And I gave a hypothetical. They purchased a
12 vehicle and then there is a negligent reporting to a
13 credit agency stemming out of the sales contract, the
14 financing contract. That arises out of or relates to
15 the vehicle described above. It is a matter related to
16 it.

17 A fall by an invitee on the premises of a retail
18 location and resulting loss of consortium claims from
19 her husband, that in no way arises out of or relates to
20 the vehicle and it is not a matter that is related to
21 any of these other instances that are listed here under
22 a plain reading. Service agreements, extended
23 warranty, whether you purchase gap insurance, whether
24 you are happy with your credit application, credit
25 insurance. It's just so beyond the scope of anything

1 that any customer would ever anticipate.

2 And the linchpin of any contract in this state is
3 that you have to have a meeting of the minds. And I
4 think that that includes these claims here.

5 THE COURT: Okay. I appreciate it. Mr. Martin,
6 do you want to respond?

7 MR. MARTIN: Yes, quickly, Your Honor. First of
8 all, the significant relationship test was built very
9 clearly in Landers. I think that it is on Page 217
10 where Justice Kittredge said, We take this occasion to
11 revisit Federal jurisprudence regarding the analytical
12 framework to determine whether a broad arbitration
13 clause encompasses certain claims. And he makes it
14 very clear that significant relationship only has to
15 simply touch matters covered by the arbitration
16 provision.

17 So, that is the standard. That is South Carolina
18 Supreme Court standard applying Federal substantive
19 law. That is the latest opinion of our Supreme Court
20 and that is what would control any appeal if we have to
21 appeal this.

22 The second thing is, it's very important to say
23 that while she is in the purchase process that that
24 touch upon the issues. And she signed an arbitration
25 agreement that said, I agree that any tort that touches

1 upon my purchase of this car or relates to the
2 purchase, I will agree to arbitrate. So, when you take
3 the Federal standard which says all of those things,
4 seven things, one to seven, you have got -- then, under
5 the expansive reach of the FAA, a tort claim need not
6 raise an issue that requires reference to or
7 construction of the contract.

8 So, it doesn't have to deal with the finance
9 contract. It doesn't have to deal with the purchase
10 contract. It has to deal with the purchase or relate
11 to the purchase and just touch upon. There is this
12 strong presumption ever -- in fact, the Court is
13 required and must bind arbitration unless, what -- no
14 doubt, no doubt, you think it's not covered. And that
15 is -- that is why I think the Landers case is so
16 powerful. Justice Kittredge did a very, very thorough
17 job in laying out the law and applying the law to the
18 facts.

19 The one case that we do have about personal injury
20 comes from a Federal Court in Pennsylvania, which is
21 persuasive. There is not one case that even -- that
22 even says you can't do it in South Carolina. That
23 hasn't been brought before you.

24 And, finally, the facts of this case are what
25 controls your decision. You can hook up five or six or

1 eight ridiculous scenarios that may or may not apply,
2 but under the law you have to look at what is pled
3 here. She admits they came to buy a car, she admits
4 that she was on the way to pick up her car, to actually
5 get in it and take it home. She admits that she fell
6 between the dealership door and getting into the car.

7 Those are the facts that control. Was that in the
8 process of the purchase? Is the -- is the fact that
9 the actual parking lot part of the showroom? Is this a
10 normal place that the dealers deliver cars? Is this a
11 place that they need to be sure that there's sufficient
12 lighting and that the place is kept in a safe manner.

13 So, those are the facts that you need to analyze
14 this under. The Federal substantive law says you must
15 assume arbitration unless you clearly and unequivocally
16 can say there's no doubt. Even if there's doubt. In
17 fact, Judge Kittredge says that in his decision. He
18 says, Even if there is doubt, you must decide in favor
19 of arbitration. Okay? He literally says that in the
20 decision. So, our position is once you get under the
21 Federal substantive law, thanks to ATT Mobility and the
22 (audio break) in the Federal Arbitration Association,
23 your hands are really tied unless they can absolutely
24 convince you that it has nothing to do with -- does not
25 touch upon the relationship of the process of

1 purchasing the car. So.

2 THE COURT: Okay. Ms. Peavy, anything else you
3 need to add?

4 MS. PEAVY: Just briefly, Your Honor. I would
5 direct your attention to the Wilson v. Willis opinion
6 of our Supreme Court from last April, Justice Beatty.
7 In this opinion he really articulated what the law of
8 arbitration is in this state. And he said, and I'll
9 just quote briefly, Your Honor, Although arbitration is
10 viewed favorably by the courts it's predicated on an
11 agreement to arbitrate. The parties are waiving their
12 fundamental right to access -- to access to the courts.
13 The presumption in favor of arbitration does not apply
14 to the existence of such an agreement.

15 So, here you have no meeting of the minds. It
16 could not have possibly been anticipated by these
17 customers that a catastrophic personal injury case
18 related to their vehicle financing agreement and their
19 2008 Highlander. The Defense argues that the
20 hypotheticals that I presented to the Court are
21 somewhat ridiculous, but really the Defendant is asking
22 the Court to make new law that finds that an
23 arbitration agreement is unfettered in scope and is
24 limitless.

25 So, you know, we would ask the Court to rely upon

1 the significant relationship test, which remains on
2 this Aiken World Finance and its progeny. And all of
3 the cases I have cited in my brief very clearly point
4 out that there must be an agreement to arbitrate. And
5 we don't think that's here.

6 THE COURT: Okay. All right. Well, I will read
7 some of the cases and I will request a proposed order
8 from someone. Okay? So, hopefully I'll let you know
9 something by at least the beginning of next week.
10 Okay?

11 All right, thank you, y'all, I appreciate it.

12 (Whereupon, the motion hearing was concluded.)

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CERTIFICATE

STATE OF SOUTH CAROLINA:

COUNTY OF BEAUFORT:

I, MONA L. MANLEY, Court Reporter, certify that I was authorized to and did stenographically report the foregoing proceedings and that the transcript is a true and complete record of my stenographic notes, based on the sound transmitted through the Zoom program.

DATED this 19th day of August, 2020.

Mona L. Manley /s/
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Feb 26 2021

SC Court of Appeals

Certificate of Counsel

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

February 26, 2021

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